LEADING CASES
IN
CONSTITUTIONAL LAW
BRIEFLY STATED

WITH INTRODUCTION AND NOTES.

BY

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JUDICIA ENIM ANCORAE LEGUM SUNT UT LEGES REIPUBLICAE.

FIFTH EDITION

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PREFACE

TO THE FIFTH EDITION.

In the third and fourth editions of this work the late editor, Mr. Charles L. Attenborough, whilst adding largely to the Notes refrained from any addition to the Leading Cases—in fact he eliminated a few, which did not appear to him entitled to be called "leading." Since the fourth edition appeared in 1908, a considerable number of highly important constitutional issues has been raised in the Courts, due in a large measure to the War of 1914. Within the limits of space and time allotted to me, I have endeavoured to bring this little book up to date by including some of the most important of these cases; by adding some pre-war cases over-looked in previous editions; by appending to both classes of cases explanatory notes; by amplyfying the existing notes where necessary, and by deleting some statements which appeared incorrect. I have also re-arranged the cases dealing with the Liability of the Executive and the Liberty of the Subject.

Under the title "Superior Orders," I have added the cases to which the War gave prominence. The Introduction has been almost entirely re-written.

HUGH H. L. BELLOT.

2, King's Bench Walk,
Temple.
June, 1921.

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*** *The principal Cases are printed in italics.*

INTRODUCTION.

The Nature of Constitutional Law.—It has been said of Constitutional Law, as it has been said of International Law, that it is not law at all. This at once raises the question, 'What is law?' Following Austin's definition of law in the strict sense of the term, 'as rules laid down for an intelligent being by an intelligent being,' Holland defines a law in the proper sense of the term as 'a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society.' In other words, 'a general rule of external human actions enforced by a sovereign political authority.' A somewhat shorter definition is that by Frederic Harrison. 'Law,' he says, 'is a general rule of external human action, which the sovereign power will cause to be respected by its own Courts,' or, negatively, 'nothing is law which the sovereign power will not enforce in its own tribunals.'

It will have been observed that Holland's definition of law, which he terms 'Positive Law,' contains several elements. First, the rule must be of general application, commanding acts or forbearances addressed to all the members of a class. Secondly, law deals only with the external acts of the will. Thirdly, these rules will be enforced by a determinate human authority. Every command issued by such authority is accompanied by a *sanction*, a term used to express the evil which will follow if the command is disobeyed. Finally, such authority must be that which in any given human political society is paramount to all other authorities within or without such society; that is to say, it must be the sovereign power. Austin has defined a sovereign

power as that which 'is not in a habit of obedience to any determinate human superior, while it is itself the determinate and common superior to which the bulk of a subject society is in the habit of obedience. Sovereign power, therefore, has a double aspect. It is independent of all control from without: it is paramount over all action within.

These definitions, however, are not accepted by everyone. Main has shown that historically they are unsound. He maintained that usages which, prior to any law-making authority or anything in the nature of a Court of law as we understand the terms, were in fact observed by the common consent of the community, were just as much law as Acts of Parliament or judicial decisions are now. Oppenheim, Sir Frederick Pollock, and Professor Vinogradoff agree with him. 'These usages,' says the latter, 'were in fact enforced by the public opinion of the community with a stringency as potent, if not more potent, than that now exercised by modern law Courts, backed up by all the forces of a modern State.' Oppenheim defines law as 'a body of rules for human conduct within a community which by common consent will be enforced by external power.'

The most conspicuous modern example of customary law is the Common Law of England, or, as it is sometimes called, 'the custom of the realm.' Although Holland denies to custom the title of law until it has received recognition from Parliament or from the Courts, yet he admits that when recognised such recognition has retrospective effect, implying that the custom was law before it received the stamp of legislative or judicial interpretation. This is practically an admission that a custom which is generally observed and enforced by the external power or public opinion of the community in which it prevails is law until Parliament or the Courts otherwise declare. Nevertheless, the distinction between a usage and a legal custom as understood in the strict sense in English law must be drawn. A usage, before it can

become a legal custom must conform to certain tests. It must be certain; continuous; have existed from time immemorial; must not be unreasonable; must be compulsory; and must be consistent.

The source of all law is recognition, or consent, express or implied. It is expressed by Acts of Parliament and judicial decisions. It is implied by customs which are habitually observed and which are tolerated by the sovereign authority. Two theories are held as to adjudication as a cause of law—the one, that the Judges only declare the law—they do not legislate; the other, that although they profess not to make any alteration in the existing law, they do in fact, imperceptibly perhaps, as a rule bring the law into conformity with modern opinion. Under the Anglo-American legal systems their decisions are regarded as authoritative declarations of the law until reversed by the Legislature.

We may now ask what is meant by the law of the Constitution of a country. 'It means,' says Paley, 'so much of its law as relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office and jurisdiction of Courts of justice. The Constitution is one principal division, section or title of the code of public laws, distinguished from the rest only by the superior importance of the subject of which it treats.'[1]

According to Dicey, Constitutional Law includes 'all rules which directly or indirectly affect the distribution or exercise of the sovereign power.' These rules, however, although classed by Dicey under the term 'Constitutional Law,' include not only laws in the juristic sense—*i.e.*, Positive Laws, which he terms 'the Law of the Constitution'—but also rules which are not laws properly so called, which he calls 'the Conventions of the Constitution,' or 'Constitutional morality.' In his view nothing is law but that which will be enforced by the Courts. In this he follows Frederic Harrison. Consequently he con-

[1] Moral Philosophy vi., c. vii.

siders the second set of rules 'consisting of conventions, understandings, habits or practices, which, though they may regulate the conduct of the sovereign power, of the ministry or of other officials . . . since they are not enforced by the Courts,' are not really laws at all. But whilst the Courts will not directly enforce the conventions of the Constitution they will, in the case of violation of some of them, enforce them indirectly. This is what Dicey means when he says that the conventions are ultimately dependent on the law of the land. For instance, if the Ministry of the day persisted in acting in direct opposition to the will of the House of Commons, the latter, by refusing to pass the annual Mutiny Act or the Appropriation Acts, would drive them if they continued in office into a course of illegal actions which would eventually bring them into conflict with the Courts. The true sanction, therefore, of the Conventions is, Dicey contends, not public opinion, but the law of the land itself.

Although, as Lowell points out, this may be the ultimate sanction, it is not in fact the real motive. The ultimate sanctions of the law are not usually present in the minds of men in English public life. The Conventions are obeyed because they express the common purpose of the community.[1] Dicey's division of Constitutional Law into law which is true law and law which is not law at all is a contradiction in terms and in conflict with his definition of law. And his attempt to confer upon some Conventions the title of true law, because they may indirectly be enforced by the Courts, is not very happy. If, however, Oppenheim's definition of law is accepted, the Conventions are customary law—*i.e.*, are rules which by the common consent of the community are enforced by external power. Anson's title of his treatise, 'The Law and Custom of the Constitution,' in which he does not attempt any definition, would appear to be the better description of this branch of public law.

[1] Government of England i., 10-13.

Sovereignty.—This question is too controversial for detailed examination here. We need only note that in the seventeenth century there were three competitors for the supreme power in the State—the monarch, Parliament and the lawyers. According to the mediæval theory the law was supreme. Even the King, as Bracton taught, was bound to obey the law. Sir Edward Coke claimed that the Judges were entitled to hold a statute void, either because it was against reason and natural law, or because it trenched on the royal prerogative. Had this claim been conceded the Courts would have become the ultimate supreme authority. It was submerged in the political struggles of the seventeenth century, in which it was finally determined that the sovereign power lay not in the King nor in the law, but in the King in Parliament. The theory, however, was carried across the Atlantic and lies at the root of the American Constitution, whereby a statute contrary to the principles of the Constitution may be declared unconstitutional and consequently void, whereas in Great Britain an Act of Parliament cannot be declared unconstitutional by the Courts, and can only be repealed by another Act of Parliament. Whilst all agree that the *legal* sovereignty lies in the King in Parliament, opinion is divided as to the place of *political* sovereignty. Some would assign it to the representatives of the House of Commons, others to the electorate, and others to the people at large. But wherever it resides, it is the ultimate supreme power and the Government is its agent.

The main functions of the Government are threefold: Legislative, Executive, and Judicial. But in the exercise of those functions there is no clear-cut division. Parliament is at once a legislative and judicial body, and its title, 'The High Court of Parliament,' and the fact that an Act is technically a *judicium*, indicate that its principal business was originally judicial. The House of Lords still retains its judicial function, sitting for judicial purposes as the final Court of Appeal. And the Judges, although they do not openly admit it, do in fact legis-

late, although not, perhaps, to the same extent as formerly.[1]

Of these functions, the Legislative is carried out in the main by Parliament itself, although certain powers of legislation are delegated to the Crown in Council, to subordinate officers, and even to certain private corporations. These delegations to statutory authorities have of late assumed a mass of enormous bulk and grave portent.[2] The Executive function, on the other hand, is exercised entirely by delegates, under the direction of the Crown.

Briefly, then, we may conveniently say that the Legislative function is the supreme power of making laws; the Executive function is the supreme power of executing them; and the Judicial function is the supreme power of interpreting them when called upon.

We may now proceed to examine the judicial decisions for illustrations and proofs of the constitutional limitations of these several branches of the supreme power, taking them in the order here laid down.

I. The Legislative Function.

i. *The Crown.*

The legislative function properly belongs to the King in Parliament, and no single branch may normally legislate without the concurrence of the other two. There is, however, an important exception. Under the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), the Crown and the Commons can enact without the co-operation of the House of Lords. The Executive has a limited power of legislation by Orders in Council, &c., but only when such power has been expressly delegated by Parliament.[3]

Speaking generally, and leaving out of view such special emergencies as the Civil War or the Revolution,

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[1] 'The whole of the rules of equity and nine-tenths of the rules of the Common Law have in fact been made by the Judges': Mellish, L. J., in *Allen* v. *Jackson*, 1 Ch. D. 405.

[2] See Cecil T. Carr, 'Delegated Legislation.'

[3] See Carr's 'Delegated Legislation.'

the majority of the attempts at independent legislation has been made by the highest branch of the Legislature —the Crown.

The Crown has attempted to exercise a power of independent legislation in virtue of an asserted prerogative by licence and dispensation, or by proclamation and ordinance: *Case of Monopolies*; *Case of Proclamations*; *Att.-Gen.* v. *Brown*; and *Frailey* v. *Charlton*. It has also claimed the right of suspending and dispensing with laws passed by Parliament. *Thomas* v. *Sorrell* and *Godden* v. *Hales* were cases of particular dispensations; while the *Case of the Seven Bishops* illustrates the attempt to suspend certain penal statutes by royal proclamation. The power of taxation is constitutionally a department of the legislative power. Attempts on the part of the Crown to exercise it were seen in *Bate's Case* (*the Case of Impositions*), where the King imposed a customs duty without consent of Parliament; and *Rex* v. *Hampden* (*the Case of Ship Money*), where writs were issued for the collection of money without Parliamentary authority. *Bowles* v. *Bank of England* is a modern illustration of the attempt to levy taxation in an irregular manner. The procedure of deducting income tax under a resolution of the House of Commons was regularised by the Provisional Collection of Revenue Act, 1913 (3 Geo. 5, c. 3). Other attempts to levy taxes without the authority of Parliament are illustrated by *Att.-Gen.* v. *Wilts United Dairies, Lim.*, and *Brocklebank & Co., Lim.* v. *The King*.

In some of these cases the decision of the Courts was for the Crown; and the principle that the Crown may not legislate nor impose, save with the consent of Parliament, was not established without violent struggles.

ii. *Parliament.*

Some of the cases noticed under this heading illustrate unconstitutional attempts by the House of Commons to exercise exclusive authority in relation to

its own constitution by seeking to establish rules of privilege, which led to collisions with the Courts and with the House of Lords.

It was admitted that the House of Commons had a right to determine all matters touching the election of its own members. But the attempt to enlarge this privilege and to determine the rights of electors led, in more than one case, to a conflict between the House of Commons on the one side and the Courts, together with the House of Lords, on the other: *Ashby* v. *White*.

The undoubted privileges of the two Houses, however, are very large. Either House may commit for breach of its privileges: *Lord Shaftesbury's Case*; *Burdett* v. *Abbot*. Parliamentary freedom of speech is illustrated by *Rex* v. *Eliot, Holles and Valentine*, and freedom from arrest by *Goudy* v. *Duncombe*, though the privilege has been held not to protect a Member for what he does out of Parliament.

Again, in the case of *Stockdale* v. *Hansard* a limit was set to the privilege of Parliament, and it was decided that it may not authorise libellous matter to be published. A statute was passed to meet this difficulty. But the case is decisive of the right of the Courts to inquire into matters of Parliamentary privilege.

The Courts will not inquire into the ground of a commitment: *Sheriff of Middlesex's Case*. Neither will the Courts interfere with the entire control of the House over its own proceedings: *Bradlaugh* v. *Gossett*. But this power of commitment is not necessarily inherent in all Colonial Legislatures: *Doyle* v. *Falconer*; *Fielding and others* v. *Thomas*; and *Harnett* v. *Crick*.

II. The Executive Function.

i. *The Crown.*

The Crown is the head of the executive power, and as such is entitled to allegiance, the nature and limitations of which are considered in *Calvin's Case*, which

leads naturally to the consideration of nationality and the status of aliens. The Crown is also invested with certain high prerogatives, though they are of course subject to the law of the land.

With regard, indeed, to Colonies and Dependencies obtained by conquest, as opposed to those acquired by occupancy or settlement, the Crown (subject to the paramount authority of Parliament) possesses the whole authority of legislation. It is limited, however, by this restriction, that when it has once granted a Legislature to such a Colony it cannot afterwards exercise there any legislative power: *Campbell* v. *Hall.*

It is a fundamental principle of the Common Law that where there is a right there is also a remedy for any infringement of that right. But when we suffer an injury at the hands of the Executive or some Department of State and seek a remedy, we are met with the maxim 'The King can do no wrong,' and therefore no action lies. Unless, therefore a right of action is expressly given by statute or the Department is incorporated, no action lies against the Crown or against any of its Departments. In the case of some more recently reconstructed or newly created Departments such a right has, however, been conferred. Although the Sovereign is immune, his Ministers are not, whether they acted under his express orders or not: *Danby's Case.*

But although the subject may not bring an action against the King, he may present a petition in respect of certain rights illegally invaded by the Crown.

The remedy only arises when the rights of the Crown are directly involved. The only cases in which a petition of right is available are where the lands or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim for a liquidated sum arises out of a contract, as for goods supplied to the Crown or to the public service, or for unliquidated

damages for breach of contract for dues and duties which have been paid to the Crown: *The Saltpetre Case*; *In re A Petition of Right*; *In re De Keyser's Royal Hotel, Lim.*; *Robinson & Co., Lim.* v. *The King*; *Lord Mayor, &c., of Dublin* v. *The King*; *Campbell* v. *Hall*; *Bankers' Case*; *Macbeath* v. *Haldimand*; and *Gidley* v. *Lord Palmerston*.

Where Government officials or Departments of State have been invested with the attributes of a corporation they may be sued: *Graham* v. *Commissioners of Public Works*. By statute some Departments are liable to be sued in both contract and tort. All public servants are liable for their criminal acts: *R.* v. *Hall*. Governors of colonies are not viceroys, and their powers are limited by the express terms of their commissions. They may be sued, therefore, either in their own Courts or in the English Courts: *Mostyn* v. *Fabrigas*; *Hill* v. *Bigge*; *Phillips* v. *Eyre*. They will not be held responsible, however, for an act of State: *Musgrave* v. *Pulido*. A viceroy, having a fuller delegation of royal authority, cannot be sued at all in his own Courts for an act done by him in his official capacity: *Luby* v. *Lord Wodehouse*.

But a petition of right does not lie in respect of a claim founded upon tort nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty: *Lane* v. *Cotton*; *Viscount Canterbury* v. *Att.-Gen.*; *Rogers* v. *Dutt*; *Tobin* v. *The Queen*; *Grant* v. *Secretary of State for India*; and *Bainbridge* v. *Postmaster-General*.

ii. *Servants of the Crown.*

Whilst the subject is protected against the improper exercise of the powers entrusted to servants of the Crown the latter, when acting in their official capacity, enjoy certain immunities. The principal instrument under the Common Law for the protection of the liberty of the subject is the writ of *habeas corpus ad subjiciendum*, which ensures that any person who is alleged to be

illegally detained or imprisoned shall be produced in Court and the cause of his detention then and there subjected to inquiry. The writ is of great antiquity, and appears to have been first used in personal actions in which it was sought to compel the appearance of the defendant. But its use by the subject against the Crown is not known till the time of the Tudors. It was the forced loan of 1626 which raised the question of the power of the King to detain in confinement without cause shown, and which resulted in the Petition of Right: *Darnel's Case*. The right to the writ became statutory by 16 Car. 1, c. 10 (1640), but illegal detentions were still common. After a long Parliamentary struggle the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), was passed. This statute introduced no new principles. It conferred no new right. It did not even affirm the Common Law right. It merely provided machinery for more effectually enforcing the right of persons imprisoned for any crime or alleged criminal offence, except treason or felony. The Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), further simplified the procedure. Until the war of 1914 the Common Law right to the writ had never been denied or suspended by Parliament. Only partial suspension of the Habeas Corpus Acts had taken place. But in *Rex* v. *Halliday*; *Ex parte Zadig* the question was raised whether under the Defence of the Realm Acts the power of suspending the right could be delegated by Parliament to the Executive. In connection with this subject the cases of *Stanley* v. *Harvey*, *Sommersett's Case*, *Forbes* v. *Cochrane* and *Rex* v. *Allan* exhibit the attitude of the law towards slavery, whilst *Pigg* v. *Caley* is the last case in which villeinage was alleged in the Courts. *In re Castioni* is an authority on the power of the Executive to extradite aliens, whilst *Rex* v. *Broadfoot* illustrates an exception to the liberty of the subject in which the right of the Crown to impress sailors was upheld.

Another valuable guarantee of the rights of the subject against the Executive consists in the doctrine of

the illegality of general warrants, here illustrated by *Leach* v. *Money*, *Wilkes* v. *Wood*, and *Entick* v. *Carrington*. In the last two cases the plaintiff recovered damages against the agent of the Executive.

It is an important constitutional principle that only soldiers are subject to military law: *Grant* v. *Gould*. As to the relations between officers in the military and naval services and their liability to their subordinates, they are governed by the principle that those who have voluntarily entered these services are bound by their regulations. The Courts will, generally speaking, decline to discuss essentially military or naval matters. No remedy is obtainable in a civil Court for damage, even maliciously caused to his subordinates, by a superior officer acting within the scope of his duties: *Sutton* v. *Johnstone*; *Dawkins* v. *Lord Rokeby*; *Fraser* v. *Hamilton*; *Fraser* v. *Balfour*. Nor are officers liable to outsiders for any injury done by them while properly acting in discharge of their duties: *Buron* v. *Denman*. But they are liable for tortious acts done without authority. *Madrazo* v. *Willes*.

The fundamental principle of Constitutional, as of International, Law that the order of the Crown or of a superior officer for the commission of an illegal act cannot be pleaded in bar, is illustrated by the cases of *Rex* v. *Thomas*, *Keighly* v. *Bell*, and *Reg.* v. *Smith*.

The integrity and independence of our judicial system is secured in various ways. The Sovereign, although he is the fountain of justice and the Judges are regarded as his delegates, cannot personally determine causes: *The Case of Prohibitions*. No jury is liable to be fined or otherwise punished for its finding: *Floyd* v. *Barker*; *Bushell's Case*.

The existence of the jury itself, however, would seem to be threatened by a recent statute (10 & 11 Geo. 5, c. 81, s. 2), and by an order of the Supreme Court issued in pursuance thereof (Ord. XXXVI., r. 6). Attention is directed to the seriousness of this by Bankes, L. J., in *Ford* v. *Blurton* (*infra*, p. 145).

The Judges are now independent of the Crown, since they can be removed only on an address of both Houses of Parliament. They are made independent of the people by not being civilly liable for any judicial act: *Hamond* v. *Howell*; *Houlden* v. *Smith*; *Anderson* v. *Gorrie*. This extends even to a Judge acting without jurisdiction, unless he knew, or ought to have known, that he had no jurisdiction: *Calder* v. *Halket*.

The same immunity is afforded to the parties and their advocates, and to the witnesses in all legal proceedings: *Astley* v. *Younge*; *Munster* v. *Lamb*; *Seaman* v. *Netherclift*.

Finally, a group of cases is presented illustrating the liberty of the Press, which is one of the strongest guarantees of constitutional rights. *Wason* v. *Walter* shows that Parliamentary proceedings may be fully reported: and *Usill* v. *Hales* shows that this freedom covers also the reports of proceedings in Courts of justice. It has been held, however, not to extend to the proceedings of public meetings: *Davison* v. *Duncan*; though now, by statute, protection has been secured to newspapers in this respect also.[1]

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[1] Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

LEADING CASES.

GRANT OF MONOPOLIES.

The Case of Monopolies. 44 *Eliz.* 1602.

11 *Rep.* 85.

Case.] This was an action by Darcy, a groom of the privy chamber to Queen Elizabeth, against Allein, a haberdasher, for making playing-cards, for the exclusive importing and making of which Darcy held a patent from the Queen.

Two questions were argued at the bar: (1) Was the grant of sole making good? (2) Was the dispensation from the stat. 3 Edw. 4, c. 4, which imposed a penalty on importing cards, good?

It was argued for the defendant, and

Held by *Popham*, C. J., and the Court that: (1) The grant was a monopoly, and therefore void as against both common law and statutes, and also as against public policy; (2) The dispensation was also against law. The king may dispense with particular persons, but may not dispense for a private gain with an Act passed *pro bono publico*.

Judgment for the defendant.

Note.—Coke adds that 'our lord the king that now is,' in his 'Declaration,' printed in 1610, has published that 'monopolies are things against the laws of this realm.' In 1623 a statute was passed declaratory of the law, which, however, reserved the rights of corporations and of 'any companies or societies of merchants' (21 Ja. 1, c. 3, s. 9), and continued for many years the subject of controversy.

In 1683-5 the question was fully discussed in the *East India Co.* v. *Sandys*, when the grant of sole trading to the company was held good.[1]

[1] 10 St. Tr. 371; Skinner, 132, 223.

The very elaborate judgment of *Jeffreys*, C. J., was separately printed in 1689, and is spoken of by Macaulay as 'able, if not conclusive.' In 1694 the company obtained a further charter, upon which a resolution was carried by the House of Commons 'that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament,'[2] and this has ever since been considered to be the sound doctrine.

The statute of James I. expressly provided that no declaration therein contained shall extend to any letters patent and grants of privilege to inventors for the term of fourteen years or under. This term may now be extended by the High Court of Justice for a further period of seven, or even, in exceptional cases, fourteen years.[3]

It was decided in the case of *Feather* v. *The Queen*, in 1865,[4] that letters patent do not preclude the Crown from the use of the invention protected by the patent, even without the assent of or compensation made to the patentee; it has, however, since been enacted[5] that a patent shall have to all intents the like effect as against His Majesty as it has against a subject; provided that any government department or its agents or contractors may at any time use the invention, for the services of the Crown on such terms as may be agreed between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all the parties interested.

ROYAL PROCLAMATIONS.

The Case of Proclamations. 8 *Ja. I.*, 1610.

12 *Rep.* 74 (vi. 297); 2 *St. Tr.* 723.

Case.] This arose out of the Petition of Grievances. On the 20th Sept. 1610, *Coke*, as C. J., was called before the Privy Council; and it was referred to him whether the King, by Proclamation, might prohibit new buildings in London, or the making of starch of wheat, these having been preferred to the King by the House of Commons as grievances and against law. *Coke* asked leave to consider with his colleagues, since the questions were of great importance, and they concerned the answer of the King to the Commons. It was afterwards:—

Resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference, betwixt the Privy Council and them, that the King cannot by his Proclamation create any offence which was not an offence before, for then he might alter the law of the land in a high point; also that the law of England is divided into three parts, common law, statute law, and custom, but the King's Proclamation is none of them. Also it was resolved that the King hath no prerogative but that which the law of the land allows him. But the King, for prevention of offences, may by Proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law.

Note.—The legislative power originally resided in the King in Council, *e.g.*, the statutes *Quia Emptores* and *De Donis Conditionalibus*—twin pillars of real property law—were so passed in the reign of Edward I. And even after the introduction of Parliamentary legislation as we know it, there existed side by side a system of royal

legislation by Ordinances and later by Proclamations. In the 16th century the Commons were petitioners rather than legislators. These ordinances had the form of law, and by 31 Hen. 8, c. 8 (1539), the King was empowered, with the advice of his Council, to legislate by proclamations, which were 'to be observed as though they were made by Act of Parliament,' and offenders to pay such forfeitures and to suffer such imprisonment as should be expressed in the proclamations. Although repealed by 1 Edw. 6, c. 12, s. 4, proclamations continued to be issued and enforced, but it was agreed by the judges in the reign of Mary that the king may make a proclamation *quoad terrorem populi*, to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law but only confirm and ratify an ancient one.[1] Notwithstanding this declaration and the opinion expressed by Coke and his fellow judges in the above Case of Proclamations, mandates of this kind continued to be issued by the King in Council, and enforced by the Star Chamber until that court was abolished in 1641.

It is of course still legal for the Crown to issue Proclamations, either when authorised by statute or for the enforcement of the existing law, but there appear to have been few instances of illegal proclamations since the abolition of the Court of Star Chamber, in which their observance was usually enforced. An instance, however, occurred in the year 1766, when, in a case of apparent urgent necessity and at a time when Parliament was not sitting, the King, on the advice of his ministers, laid an embargo by proclamation upon all ships laden with wheat or flour with a view to prevent exportation and to relieve the great scarcity caused by a bad harvest. With some difficulty Parliament was afterwards induced to pass an Act indemnifying the ministers and those who had taken part in enforcing this proclamation.

For a modern authority that the object of a Royal Proclamation is to make known the existing law, and that it can neither make nor unmake law, see *Ex parte Chavasse, In re Grazebrook*, 4 De G. J. & S., at p. 662.

Attorney-General *v.* Brown.

[1920] 1 *K. B.* 773; [1921] 3 *K. B.* 29; 36 *T. L. R.* 165.

Case.] By sec. 43 of the Customs Consolidation Act, 1876: 'The importation of arms, ammunition, gunpowder, or any

other goods may be prohibited by Proclamation or Order in Council.' Under this section a number of proclamations were made during the war of 1914, the first of these being dated 15th February, 1916. By the Prohibition of Import (No. 32) Proclamation, dated 25th June, 1919, the importation into the United Kingdom of divers articles, and amongst them chemicals of all descriptions, was prohibited except under licence from the Board of Trade. In August, 1919, six casks of pyrogallic acid were imported into the United Kingdom by the defendant without licence. The Crown claimed forfeiture of the casks. Pyrogallic acid is used in photography, and the Attorney-General argued that since photography is used in war, the acid was in the same category as arms, &c.

Judgment.—To give effect to this contention, said *Sankey*, J., would be straining language. It is hard to conceive any article which is not used in modern warfare or in the preparation of some article used therefor. The doctrine of *ejusdem generis* must be applied. The expression 'any other goods' does not mean any other sort of goods, but means any other goods of the kind referred to in the previous words.

Consequently the section gives no power to prohibit the importation of any goods except arms, ammunition, gunpowder and any other goods of the same kind. If it had been desired to give the Executive an absolute prohibition in all cases there would have been no need to set out the words 'arms, ammunition, gunpowder.' The object would have been achieved by simply saying 'The importation of any goods may be prohibited by Proclamation or Order in Council.' The Act of 1876 replaced the Customs Act, 1853, which is the Magna Carta of Free Trade. 'Could Parliament,' asked the learned Judge, 'ever have intended at the moment of the birth of free trade to hand over to the Executive an absolute power to prohibit the importation of every and any article and to do so by the addition of a few general words at the end of a category of particular goods.'

Held:—His Majesty had no power to make the Proclama-

tion in question and that it was illegal and invalid: judgment against the Crown with costs. The Crown appealed.

While the appeal was pending the Indemnity Act, 1920, was passed, and came into operation of 6th August, 1920, which provided that any Proclamation or Order in Council issued, under sec. 43 of the Act of 1876, during the war and before 15th April, 1920, shall be deemed always to have been valid. The appeal was allowed on terms by consent as to costs and as to the appraised value of the goods.

Frailey *v.* Charlton.

[1920] 1 *K. B.* 147.

Case.] The respondent was charged with 'knowingly harbouring prohibited goods' under sec. 186 of the Customs Consolidation Act, 1876. He had brought on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap, which was intended for the use of the passengers on the voyage. By a Proclamation of 10th May, 1917, as amended by an Order in Council of 26th February, 1918, the export of soap from the United Kingdom was prohibited. The proclamation was issued in virtue of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21); the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44); the Customs (Exportation Restriction) Act, 1914 (5 Geo. 5, c. 2); and the Customs (War Powers) Act, 1915 (5 Geo. 5, c. 31). The respondent was not aware of the prohibition.

Judgment.—Held by *Reading*, C. J., and *Darling* and *Avory*, *JJ.*, that the ignorance of the prohibition of the respondent was a good defence. 'In my view,' said Lord *Reading*, 'the meaning of the Legislature was that no person should be convicted of an offence under sec. 186, or be subjected to the serious penalty which it imposed, unless the act complained of was done with intent to defraud His Majesty of duties and to evade the prohibition or restrictions applicable to the goods.'

CROWN—DISPENSING POWER.

Thomas *v.* **Sorrell.** 25 *Car. II.*, 1674.

Vaughan, 330—359.

Case.] The plaintiff claimed a large sum of money from the defendant for selling wine on various occasions without a licence, contrary to stat. 12. Car. 2. The jury returned a special verdict, alleging that they found a patent of 9 Ja. 1 incorporating the Vintners' Company, with leave to sell wine *non obstante* the stat. 7 Edw. 6, which Act forbad the sale of wine without certain licences.

The chief question to be argued was the validity of these letters patent; and to 'this dark learning of dispensations' *Vaughan*, C. J., applies himself at great length.

His judgment may be summarised as follows:—

He refers to an old rule laid down in a case of 11 Hen. 7, that with *malum prohibitum* by statute the King may dispense, but not with *malum in se*, but he points out that this rule had more confounded men's judgments on the subject than rectified them, inasmuch as every *malum* is in truth a *malum prohibitum* by some law. By a process of reasoning, by no means clear or easy to follow, he arrives at the conclusion that the King cannot dispense with any general penal law made for the general good or the good of a third party, but that he may dispense in the case of an offence against a law the breach of which would only affect the King himself and would not be to the particular damage of a third party. Adopting the words of Sir Wm. Anson,[1] 'his conclusion seems to amount to this, that the King might dispense with an indi-

[1] Anson, Law and Custom of Constitution, 1, 349.

vidual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for his exclusive benefit.'

Judgment was given for the defendant, *i.e.* in favour of the validity of the patent.[2]

Godden *v.* Hales. 2 *Ja. II.*, 1686.

2 Shower, 475; 11 *St. Tr.* 1165.

Case.] This was a collusive action, brought to establish the power of the King to grant a dispensation for a continuous breach of a general penal statute. The plaintiff sued Sir Edward Hales, who had been appointed colonel of a foot regiment, for neglecting to take the oaths of supremacy and allegiance and to receive the Sacrament, which he was bound to do as a military officer by the Test Act (25 Car. 2). He had been indicted and convicted at the Rochester assizes, and the present action was to recover the penalty of 500*l.* provided by that statute.

The defendant pleaded a dispensation from the King by his letters patent under the Great Seal discharging him from taking the oaths and receiving the Sacrament. The question was whether this dispensation constituted a good bar to the action.

Judgment.—Eleven judges out of twelve concurred in holding that it did.

It is a question of little difficulty. There is no law whatever but may be dispensed with by the supreme lawgiver; as the laws of God may be dispensed with by God Himself. The laws of England are the King's laws; it is his inseparable prerogative to dispense with penal laws, in particular cases and

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[2] The law as here laid down agrees nearly with the view of Coke: 1 Co. Litt. 120*a*; 3 Inst. 154, 186. Blackstone observes that 'The doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall when King James abdicated the kingdom' (1 Comm. 342).

upon particular necessary reasons; and of those reasons and necessities the King himself is sole judge.

Judgment for the defendant.[1]

Seven Bishops' Case. 4 *Ja. II.*, 1688.

12 *St. Tr.* 183; 3 *Mod.* 212; 2 *Phillips, S. T.* 259—355; *Broom, Const. L.* 408—523.

Case.] James II. had ordered by proclamation that a Declaration of Indulgence in matters of religion should be read by the bishops and clergy in their churches, and that the bishops should distribute the Declaration through their dioceses to be so read.

Six of the bishops met at the archbishop's palace at Lambeth and drew a petition that the King would not insist upon their distributing and reading the Declaration, 'especially because that Declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign'; and stating that they could not in prudence, honour, or conscience make themselves parties to it. This petition six of them presented to the King in person, who received it angrily. The same evening the petition was printed and published in every part of London by sympathisers of the bishops. Shortly afterwards the latter were summoned to appear before the Council to answer 'matters of misdemeanour,' and were told that a criminal information for libel would be exhibited against them in the King's Bench, and were called upon to enter into their recognizances to appear. This they refused to do, insisting upon their privileges as peers; and were accordingly committed to the Tower.

[1] The judgment of *Herbert*, C. J., proceeded upon the most extravagant ideas of prerogative. Nevertheless, it is by no means evident, in the words of Hallam (3 Const. Hist. Eng., 8th ed. 62), that this decision was against law. The dissentient judge in this case was *Street*, and *Powell* is said to have doubted for a time, but to have afterwards concurred.

At the trial on the 29th June they were charged upon an information by the Attorney-General with a conspiracy to diminish the royal authority, and in prosecution of this conspiracy with the writing and publishing of a certain 'false, feigned, malicious, pernicious and seditious libel.' They pleaded not guilty.

After much time had been wasted in attempts to prove the handwritings of the bishops, this was at last done by calling Blathwayt, a clerk of the Privy Council, who had heard the bishops acknowledge their signatures to the King.

But the libel was charged to have been written in Middlesex, and this could not be proved—as it had in fact been written at Lambeth, in Surrey. Accordingly Lord Sunderland was brought to prove a publication in Middlesex by the presentation to the King.

The document was asserted by the prosecution to be a libel, because it urged that the Declaration was based upon an illegal power.

Counsel for the defence argued:—

1. That the petition was a perfectly innocent petition, presented by proper persons in a proper manner. The bishops are intrusted with the general care of the Church, and also by stat. 1 Eliz. c. 2 with the carrying out of that Act—the Act of Uniformity; and had a right to petition in this case. There is always a right to petition or appeal to the Crown when the King or his Ministers have done or are about to do anything contrary to law.

2. As to their questioning of the dispensing power, no such power exists. The declarations of Parliament sufficiently show this. In 1662, when King Charles wished to extend an indulgence to the Dissenters, it was asserted by Parliament that laws of uniformity 'could not be dispensed with but by act of parliament.' In 1672 when the King had actually issued such a Declaration, upon the remonstrance of Parliament he caused the said Declaration to be cancelled, and promised that it should not become a precedent. In

1685, when the King announced that he had certain officers in his army 'not qualified according to the late tests of their employments,' Parliament passed an Act of Indemnity that 'the continuance of them in their employments may not be taken to be dispensing with that law without act of parliament.' Until the last King's time, the power of dispensing 'never was pretended,' on which point Somers, as junior counsel for the defence, quoted 'the great case of *Thomas* v. *Sorrell*' to show that it was there agreed by all that there could be no *suspension* of an Act of Parliament but by the legislative power.

The points urged by counsel for the Crown, which appear to have most substance in them, were that even if all the matters alleged in the petition were true that afforded no defence if, as they contended, the statements in the petition were libellous; as *e.g.*, it would be libellous to allege in a petition to a judge that his decision was illegal, and that the petitioner could not in honour, prudence, or conscience obey it, even though such decision was unjust.

That, in fact, the King's declaration was perfectly legal, the King having an especial power to issue proclamations and to make orders and constitutions in matters ecclesiastical, of which this was one.[1]

The Solicitor-General and the Recorder even went so far as to deny the right of the bishops to petition the King at all, except in Parliament, but this contention does not appear to have been accepted by any of the judges, the Lord Chief Justice declaring that it was the birthright of the subject to petition.

The judges pointed out to the jury that the two questions for their consideration were:—1. Was the publication proved?—a mere question of fact upon which there could be no doubt. 2. Was the petition libellous? *Wright*, L. C. J.,

[1] Nov 100: 2 Cro. Jac. 37.

and *Allybone*, J., expressed their opinions that it was; *Holloway* and *Powell*, JJ., thought that it was not.

The jury having retired and been locked up all night, the next morning delivered a verdict of *Not Guilty*.

Note.—This trial illustrates several questions of great constitutional importance. 1. The document presented to the King might be argued to be privileged on the ground of its being a *petition*, and this raises the question of the limitation to the right of petition.[1] 2. The Crown charged the petitioners with sedition, and thence starts an inquiry into the nature of a seditious libel.[2] 3. This alleged seditious character again arises out of the denial of the dispensing power, and the principal argument both of the bar and the bench turned upon the great question of this prerogative. The last point will be found discussed in a Note; to enter upon the others would carry us too far.

Points of law at the trial.—But upon the trial there were several minor points of law raised by the bishops' counsel which it may be useful to summarize:[3]

1. It was argued that they should not be compelled to plead, because the return made by the Lieutenant of the Tower to the writ of Habeas Corpus, upon which the bishops had been brought up for trial, did not state that they had been committed by the Privy Council as such, but by certain 'lords of the Privy Council.'

The objection was bad, since the warrant, the really important document, was sufficient in point of form.

2. Nor as lords of Parliament had they been legally committed, since 'seditious libel' was not a breach of the peace, for which sureties may be demanded. But privilege of Parliament holds except in the cases of 'treason, felony, and the peace'[4] (*i.e.* breach of the peace), and this privilege secures those entitled to it against commitment.

Both these points were overruled by three judges: *Powell*, J., in each case would like to wait to consider precedents, and would give no opinion.

3. Strong objections were taken as to the nature of the proof of handwriting offered—but these only show how unsettled was the law upon the subject of proof of handwriting. As to some, though not as

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[1] On the history of the right to petition, see 1 May, Const. Hist. Eng. 444-451; Cox, Inst. Engl. Gov. 260-265.

[2] On the controversies as to a seditious libel, Cox, Inst. Engl. Gov. 278-293; 2 May, C. H. E. 107-117, and *passim*.

[3] They will be found stated at greater length and discussed in 2 Phill. S. T. 333-355.

[4] Coke, 4th Inst. 25.

to all of the bishops, evidence was offered which would now be considered quite satisfactory in *kind*—of witnesses who had seen them write, or received letters from them, and so could testify as to the identity of handwriting, and so on. The judges being divided as to the sufficiency of the proof, other evidence was required, and therefore Blathwayt was produced.

4. The last objection was that there was no evidence of publication in Middlesex. To this the Court agreed, and were about to direct the jury to acquit on this ground, but at the last moment Lord Sunderland was produced to prove the actual delivery of the document into the King's hands.

Holloway and *Powell*, *JJ.*, who expressed opinions in favour of the defendants, were deprived of their offices shortly afterwards. At the Revolution, which soon followed, five out of the seven bishops refused to take the oath of allegiance to William III., and were deprived of their sees.

NOTE I.—ON THE DISPENSING POWER.

The existence of a suspending and dispensing power as a prerogative of the Crown is one of the questions which have most engaged the partisanship of historical and constitutional writers, and its true history has been consequently much debated. Writers like Lord Campbell and Lord Macaulay deny that it ever existed; but Hallam cautiously observes that 'it was by no means evident that the decision in *Sir Edward Hales' case* was against law.'[1] An argument for its existence will be found to have been urged in a law court so recently as 1815.[2]

It is certain that the power in our earlier history was often employed; and not unfrequently with the approval of the people. It seemed indeed almost a corollary from the King's power of pardon; if he might dispense with the penal consequences of an offence when it had been committed, it seemed natural that he should be able to supersede the necessity of pardon by a previous licence to commit the action.

It is said to have been first used by Henry III. in imitation of the power of dispensation claimed by the Pope, to all of whose rights the Crown claimed to succeed. It is true that even then protest appears to have been made against the introduction into the civil courts of the old ecclesiastical '*non obstante*' clause.[3] Nevertheless instances of dispensation became numerous, and parliaments of Richard II. permit the King to exercise the power, while reserving a right to disagree thereto; and this power is amply recognised by the Commons in the reign of Henry IV.

In the reign of Henry VII. it was determined by all the judges in the Exchequer Chamber that although an Act of Parliament forbad any person to hold the office of sheriff for more than a year, and expressly barred the operation of a *non obstante* clause, nevertheless a grant of a shrievalty for life, if it contains such a clause, would be valid. And this case was not only approved by Fitzherbert, by Plowden, by Coke, and by all the judges in *Calvin's case*, but it was followed in *Thomas* v. *Sorrell*.

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[1] 3 Const. Hist. 62.

[2] By Dr. Lushington in the *Case of Eton College*, 1815; see Anson, Law and Custom of the Constitution, 1, 351.

[3] *I.e.*, 'notwithstanding any law to the contrary.'

On the other hand the protests frequently made against its exercise were made rather against particular occasions of its use. When Charles II., wishing to employ the suspending power, issued his Declarations of Indulgence, Parliament protested, and he was obliged to withdraw them. Of this much is made in the argument of the Seven Bishops, and Macaulay considers it a complete abandonment of the right. But no protest was made on his suspending other statutes, as for example the Navigation Act.

We may fairly sum up perhaps by saying that the power had been frequently exercised, though always subject to protest when its particular exercise was disapproved. But its legality, at any rate so far as it was exercised in respect of acts which were only *mala prohibita* and not *mala in se*, was fully admitted by the courts, and there was nothing in the concessions made, for example, by Charles II., to amount to an express renunciation or statutory abolition of the claim. It was the determination of James II. to employ the power as a means of giving relief to Roman Catholics which led to a new settlement of the kingdom, and the formal abolition of a prerogative of which the people had become impatient; for questions as to the dispensing and suspending power and the right to petition were finally set at rest by the Bill of Rights (1 Wm. and Mary, sess. 2, cap. 2), by which it was amongst other things declared: '(1) That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament is illegal; (2) that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late is illegal . . .; (5) that it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal! It was also enacted by sec. 12 'That no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute.'

The words in this statute 'as it hath been assumed and exercised of late' should be noticed, as by them the ancient prerogative of the King to dispense with the punishment of an offender *after conviction*, or in other words to pardon, was saved.

The royal prerogative of pardon is a manifestation of the power which is the subject of this Note. It is now exerciseable by the Home Secretary, subject to the following rules:—

1. It relates only to offences of a public character (in which the sanction is remissible by the sovereign only, if remissible at all).

2. It must not be anticipatory. Hence, by the Act of Settlement

of 1700, s. 3, no pardon under the great seal is pleadable in bar of an impeachment.

3. It can only relieve from a penalty.

4. It cannot deprive any injured party of any rights of private suit.

The Criminal Appeal Act, 7 Ed. 7, c. 23, has not modified the prerogative, save in that the Court of Criminal Appeal, when a matter has been referred to it by the Home Secretary, has power to set aside a conviction. This would appear to be a statutory addition to the common law prerogative.[1]

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[1] On the subject generally see Chalmers and Asquith, "Outlines of Constitutional Law," pp. 16—19.

THE RIGHT TO IMPOSE.

Bate's Case (The Case of Impositions). 4 *Ja. I.*, 1606.

Lane, 22; 2 *St. Tr.* 371; *Broom, Const. L.*, 247—305.

Case.] An information was exhibited in the Exchequer against John Bate, a Levant merchant, for refusing to pay an impost or customs duty of 5*s.* per cwt. on currants, ordered by letters patent from the King over and above the statutory poundage of 2*s.* 6*d.* per cwt. Upon this statute defendant relied, and opposed payment of the 5*s.* as illegally imposed. The King's attorney demurred to these pleas.

Judgment of the four barons was unanimous *for the Crown*, on grounds of which the following is an abstract:—

1. The King's power is twofold—ordinary and absolute. The ordinary power, or common law, which exists for the execution of civil justice, cannot be changed without Parliament. But the King's absolute power affecting matters of State and the general benefits of the people is *salus populi*, and is not directed by the rules of common law, but varies according to the wisdom of the King. Customs are a material matter of State. Judgment in matters of prerogative must be not according to common law, but according to Exchequer precedents. They referred to cases in which the Crown had levied customs over and above subsidies granted by Parliament; *e.g.*, to an increased custom on foreign merchandise levied by Edw. I.; to a custom levied by Hen. VIII., and to a similar impost in the reign of Mary.

2. All customs are the effect of foreign commerce; but all commerce and foreign affairs are in the absolute power of the King. The sea-ports are the King's gates, which he may

open or shut to whom he pleases, and he has therein absolute power. He provides fortresses for their safety.

3. If he may prohibit the importation of goods, he may *a fortiori* tax them and impose the tax by way of reprisal.

4. If he may impose, he may impose what he pleases.

Petition of Grievances.—While the case was pending the matter had already been taken up by the Commons, who upon presenting a petition were informed by the King of the decision of the courts in his favour. In July, 1608, a Book of Rates was published under the authority of the great seal, imposing heavy duties upon almost all mercantile commodities, to be paid to the King, his heirs and successors. When Parliament again met in 1610 they debated the whole question, and were not deterred by the King's message that they were not to do so. The debate lasted four days, the principal speakers being Sir Francis Bacon and Yelverton [1] for the right of imposition, and Hakewill and Whitelocke on the other side.

Argument against the right.—The main points in the argument against the King's right to impose were:

I. Customs are *consuetudines*, and the very name shows that this 'duty is a child of the common law.' [2]

II. But by the common law the duty is a thing certain, not to be enhanced by the King without consent of Parliament. Where the common law has made provision, the King may not impose arbitrarily.

All our kings, from Hen. III., have sought increase of customs by way of subsidy from Parliament; sometimes by

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[1] In the State Trials (ii. 477), Yelverton is said to have spoken against the right, and Whitelocke's speech is erroneously attributed to him. *Notes and Queries*, 3 Ser. ix., 382, x. 39, 111.

[2] There were of course certain dues and customs payable to the king at common law or by a very ancient prescription; as *e.g.*, the feudal reliefs and aids, 'prisage,' which was a duty payable to the king upon every shipload of wine imported by English merchants, and a customs duty on wool.

way of prayer and entreaty, and for a short time; sometimes even by way of loan, undertaking to repay. All which is an argument that they had no such absolute power. Even Edw. III., than whom 'there was not a stouter, a wiser, a more noble and courageous prince,' prayed his subjects for a relief for the maintenance of a war (14 Edw. 3, stat. 1, c. 21). When merchants alone granted a subsidy on wool, the Commons complained, 27 [*it should be* 17] Edw. 3, and in stat. 36 Edw. 3, c. 11, it is expressly forbidden.

From the Conquest till the reign of Mary—480 years—there were only *six* impositions by *twenty-two* kings; and yet all these, even when borne for a short time, were complained of, and upon complaint removed. Other so-called impositions were 'dispensations or licences for money, to pass with merchandise prohibited by act of parliament to be exported.'

III. Even if the King had such power at common law, it is utterly abrogated by statutes, the chief being:—Magna Carta, c. 30; 25 Edw. 1, c. 7; De Tallagio non concedendo[3] (cited as 34 Edw. 1, st. 4); 14 Edw. 3, st. 1, c. 21.

These debates resulted in a *Petition of Grievances*[4] to the King, 1610; which not only complained of impositions in general, but also sought relief in respect of certain imposts on alehouses and sea coal: and begged 'that all impositions got without consent of parliament may be quite abolished and taken away.' A bill was introduced with this object, but dropped in the House of Lords. The impositions on sea coal and alehouses were remitted, but no further concession was made. A bill was again introduced in the Parliament of 1614, but the Lords declined a conference upon the subject,

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[3] The De Tallagio non concedendo, though recited as a statute even in the Petition of Right, and held to be so by the judges in 1637, seems to have been, as suggested by Dr. Stubbs, a mere abstract of Edward's confirmation of the Charters (Select Charters, 487).

[4] Printed more fully than in the St. Tr. in Petyt, *Jus Parliamentarium*, 318.

and the Parliament was dissolved without anything having been done.

Note.—The decision in this case was considered by Coke and Popham to have been correct (see 12 Rep. 33); and it was treated by the judges in 1628 as conclusively established. For a full discussion of the whole controversy, see 2 Gardiner, Hist. Engl., 1-12, 70, 75—87, 236-48 It is impossible here to give anything like a full account of the prior history of the imposition on currants, which formed the subject-matter of this case. It may, however, be stated that the duty had in one form or another existed from about the year 1580. It had originally been imposed at the request of the merchants themselves, and mainly for protective reasons. Similar duties had been imposed during the two preceding reigns, and no question as to their legality had been raised for nearly half a century.

The judgment of the Court of Exchequer has no doubt been condemned by most modern historians. Mr. Hubert Hall, of the Public Record Office, however, after a careful examination of the original records, many of which he finds to have been mis-stated and mis-quoted by those members of the House of Commons who spoke against the imposition, alleges in his 'History of the Customs Revenue in England' (Elliot Stock, 1892), that there is far more to be said in support of the judgment of the Court than has commonly been supposed; that it was in fact wholly warranted by the then existing state of the Constitution. It is unfortunate that the judgment of Chief Baron Fleming, an admittedly able and upright judge, has only come down to us in a mutilated form in the State Trials. Sir Wm. Anson (Law and Custom of Constitution, 1, p. 559) expresses an opinion that the decision in *Bate's case* violated the spirit of the Constitution rather than the letter of the law.

The question was in the end settled by legislation, at first by the Statute 16 Car. I., c. 8, and still more definitely by the Bill of Rights (1 Wm. and Mary, sess. 2, cap. 2), by which it was declared 'that levying money for or to the use of the crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted is illegal.'

R. *v.* Hampden (The Case of Ship Money). 13 *Car. I.*, 1637.

3 *St. Tr.* 825; 2 *Rushworth*, 257; *Broom, Const. L.* 303—367.

Case.] Charles issued writs for the collection of ship money to the city of London, and other maritime towns, in 1634. In 1635 he issued writs demanding composition in money, even from inland counties. Upon these writs he took the opinion of the judges, and was advised by ten out of the twelve that when the good and safety of the kingdom in general was concerned, and the whole kingdom was in danger—of which he was to be considered the sole judge—he might by writ under the great seal command all the subjects at their charge to provide such number of ships with men and munitions as the King might think fit for the defence of the kingdom, and might compel obedience to such writs. The King thereupon proceeded to issue writs to the various sheriffs commanding them to provide the ships and men mentioned in the writs, and to assess the expenses upon the inhabitants of their counties, and to imprison any who might be refractory. Similar writs were issued in 1636. On Hampden's refusing to pay 1*l.*, the amount at which he was assessed, proceedings were taken against him in the Exchequer.

He demurred, and the demurrer was heard in the Court of Exchequer Chamber.

St. John and *Holborne* appeared for Hampden.

It is conceded (1) that the law of England provides for foreign defence; and (2) lays the burthen upon all; (3) that it has made the King sole judge of dangers from abroad, and when and how the same are to be prevented; and (4) that it has given him power by writ to command the inhabitants of each county to provide shipping for the defence of the kingdom.

The question is only *de modo*. This must be by the forms and rules of law. As without the assistance of his judges the

King applies not his laws, so without the assistance of Parliament he cannot impose.

The law has provided for the defence of the realm both at land and sea by undoubted means: (1) by tenure of land giving service in kind and supply; (2) by prerogatives of the Crown; (3) by supplies of money for the defence of the sea in times of danger. These are the ordinary settled and known ways appointed by the law. But the King may not run to extraordinary, when ordinary means will serve. The King may call Parliaments when he chooses.

That Parliament is the means of supply appointed for extraordinary occasions is shown both by reason and authority.

A series of statutes were quoted showing the same thing:—Charter of Will. 1; Magna Carta; 25 Edw. 1, c. 5; De Tallagio non concedendo [1]; 14 Edw. 3, st. 2, c. 1; 25 Edw. 3; 3 Car. 1, c. 1, s. 10.

So much as to defence in general. That of the sea has nothing special. Most or all of the precedents are the charging sea-towns which are discharged of defence at land. The charge is therefore double in the one case and single in the other. Any towns not maritime ought not to be charged, which is the very case of the defendant.

Holborne would not admit that the King was the proper judge of danger, except when the danger was so imminent that Parliament could not be consulted.

Lyttelton, S.-G., and *Bankes*, A.-G., appeared for the Crown.

Judgment.—Weston, *Crawley*, *Berkley*, *Vernon* and *Trevor*, delivered judgment for the King; *Croke*, *Hutton* and *Denham* for the defendant; *Bramston*, C. J., and *Davenport* also for the defendant, but mainly on technical grounds; *Jones* and *Finch*, C. J., for the King.

Croke reiterated, and added somewhat to *St. John's* arguments.

The judgment of *Finch*, C. J.,[2] may be thus summarized:

The defence of the kingdom must be at the charge of the whole kingdom. The sole interest and property of the sea, by our laws and policy, is in the King, and sea and land make but one kingdom, and therefore the subject is bound to the defence of both. Parliament is not the only means of defending the kingdom. The King is not bound to call it but when he pleases, and there was a King before a Parliament.' The law which has given the interest and sovereignty of defending and governing the kingdom to the King, also gives him power to charge his subjects for its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties only, when the danger is general they go to inland counties also. Acts of Parliament to take away the royal power in the defence of his kingdom are void. 'They are void acts of parliament to bind the king not to command the subjects, their persons and their goods, and I say their money too, for no acts of parliament make any difference.'

Seven of the judges deciding against the defendant, *judgment* was for the Crown.

Note.—This case brought to a head the claim of the Crown to enforce direct taxation just as in *Bate's case* the question of the right to impose indirect taxation was raised. Whatever may be thought of the judgment in *Bate's case*, and we have already indicated that much could be said in its favour, it seems quite impossible to justify the judgment of the majority of the Court in the case of ship money. Apart from questions as to earlier statutes and precedents the claim of the Crown was absolutely barred by the then recent statute, 3 Car. I., c. 1 (the Petition of Right), which provided 'that no man hereafter be compelled to make or yield any gift, loan, benevolence, *tax*, or such like charge, without common consent by Act of Parliament.'

Nevertheless, similar writs were issued for the fourth and last time in 1639, but in the following year Sir Robert Berkeley and other of

[2] Lord Clarendon observes, 'Undoubtedly my lord Finch's speech in the Exchequer Chamber made ship money much more abhorred and formidable than all the commitments by the Council table, and all the distresses taken by the sheriffs in England.'

the judges were impeached, and the following resolution of the House of Lords passed: 'That the ship writs, the extra-judicial opinions of the judges both first and last and the judgment in Mr. Hampden's case and the proceedings thereupon in the Exchequer Chamber are all illegal and contrary to the laws and statutes of this realm, contrary to former judgments and contrary to the Petition of Right.' The judgment itself was declared void by the Long Parliament in 1641 (16 Car. 1, c. 14). And by 16 Car. 1, c. 8, the levy of tonnage and poundage was also declared illegal.

Bowles *v.* Bank of England.

[1913] 1 *Ch.* 57.

Case.] On 31st May, 1912, the plaintiff, Thomas Gibson Bowles, purchased 65,000*l.* Irish Land Stock, which was transferred into his name in the books of the Bank. On this stock the dividends were payable half-yearly, on 1st January and 1st July. On 2nd April, 1912, the House of Commons passed a resolution approving of the imposition of income tax at the rate of 1*s.* 2*d.* in the pound, for the financial year commencing 6th April, 1912. The Finance Act embodying the resolution did not receive the Royal Assent till 2nd August. In the meantime, on 26th June, the plaintiff issued his writ claiming an injunction to restrain the defendants from deducting the tax and a declaration that they were not entitled to do so. He subsequently amended the writ and claimed 52*l.* 10*s.* 8*d.*, the amount of income tax deducted.

Judgment.—Does a resolution of the Committee of Ways and Means, asked *Parker*, J., either alone or when adopted by the House authorise the Crown to levy on the subject an income tax assented to but not yet imposed by Act of Parliament? This can only be answered in the negative. The Bill of Rights finally settled that there could be no taxation in this country except under the authority of an Act of Parliament. This remains unrepealed, and no practice, how-

ever long acquiesced in, can be relied on by the Crown as justifying any infringement of its provisions.

The original temporary character of the income tax led to the Act being so framed as to expire, save as to arrears, at the end of the period for which it was imposed: *i.e.*, on 5th April in each year. This system led to an inconvenience, as the powers of the collectors remained in abeyance, so that necessary preliminary work could not be done. A statute (Customs and Inland Revenue Act, 1890, s. 30) made provision for this and kept the machinery clauses alive. If the assessment and collection of tax under the section is authorised before the Finance Act of the year, the following difficulties occur:—

(1.) It is not possible to assess the amount of the tax when the rate has not been fixed.

(2.) A resolution when reported to the House might not be accepted.

(3.) The resolution might be accepted, but the tax might be imposed at a greater or less rate.

(4.) If the Legislature had intended, *non obstante* the Bill of Rights, to enable the Crown to collect taxes on the authority of the Committee of Ways and Means, it would have expressly so provided.

The authority of sec. 30 of the Act of 1890 was invoked to cover the assessment and collection. To admit this would be to make it a permanent tax. Such construction is impossible; for

(1.) The subject would remain too long in doubt as to his rights.

(2.) How could the subject recover the amount of a tax provisionally levied in excess?

The proper interpretation of the section is . . . that it does not authorise the assessment and collection of a tax not yet imposed by Parliament. The words of the statute confirm this construction. Its object was stated to be the collection 'in due time.' A tax levied before the Act imposing it is

passed, is not collected in due time within the meaning of the Act.

This view was also confirmed by sec. 1 of the Income Tax Assessment Act, 1876.

With regard to the practice of the Bank of England in making deductions, Parliament has taken cognizance of this in the Finance Act, 1894. It was done in several subsequent years, and finally in sec. 14 of the Revenue Act, 1911, there are permanent provisions. It contemplates the case of dividends having been paid without deduction before the passing of the Income Tax Act, and provides what is to be done in that event. If this section recognises anything, it is the legality of the payment of dividend without deduction for a tax not yet imposed.

The learned Judge declared that the defendants were not entitled to make the deduction, and made an order for the payment out of Court of the amount claimed, and for the payment of the plaintiff's costs by the defendants.

Note.—The income tax is levied for one year only, and expires on 5th April in the following year. It can only be reimposed by a new Act. Without such legislative sanction it was levied from 6th April, 1909, till 29th April, 1910, at which latter date the Finance Bill for the year 1910-1910 received the royal assent and became an Act.

Similarly, on 6th April, 1910, there was no Act imposing income tax for the year 1910-1911. The tax was nevertheless levied from that date till 28th November, 1911, when the Finance Bill of the year received the royal assent. Again, in the year 1911-1912, income tax was unlawfully levied till 16th December, 1911. In the year 1912-1913 the period of unlawful imposition was from 6th April, 1912, till 6th August in 1912.

It is estimated by Mr. Gibson Bowles that a sum of 12,000,000*l.* was exacted without lawful authority.

The decision in the above case brought about a change in the law. The levy of this tax is conducted by the Commissioners of Inland Revenue, who act under the direction of the Treasury. Certain duties in connection with deduction devolve on the Bank of England, viz., as regards the deduction in those cases where it is deducted at the source. The statute 3 Geo. 5, c. 3, authorises the collection or deduction

of the tax for a period of four months only, *i.e.*, till 6th August in the fiscal year. This renders it necessary that the Finance Bill shall pass within four months if a breach of the law is to be avoided. The Act applies to customs and excise and income tax.

By sec. 1, sub-s. 1, of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), a Money Bill must be sent to the House of Lords not later than one month before the end of the session. If, being so sent, it is not passed by the Lords within a month, it becomes law on receiving the royal assent without the co-operation of the Lords. The Act provides a special enacting clause for use in cases within its sections. Sub-sec. 3 provides that a Money Bill shall be endorsed as such by the Speaker of the House of Commons.

Attorney-General *v.* Wilts United Dairies, Ltd.

37 *L. T. R.* 884 (1921); 38 *L. T. R.* 781 (1922).

Case.] In this case the Attorney-General sought to recover from the defendants the sum of 15,027*l.* 4*s.* 6*d.*, being the amount of 2*d.* a gallon which they had agreed to pay on milk purchased by them under licence from the Food Controller. The latter had granted the licence under the Milk (Registration of Dealers) Order, 1918, and the Milk (Distribution) Order, 1918, made in virtue of the Defence of the Realm Act.

Judgment.—It was held by the Court of Appeal that the imposition of 2*d.* a gallon was a levying of money for the use of the Crown without grant of Parliament within the meaning of the Bill of Rights. The imposition as a condition of the grant of a licence was not within the statutory powers of the Food Controller and was consequently illegal. The fact that it was expressed in the form of an agreement made it no less so. Upon appeal to the House of Lords, Lord *Buckmaster* said the appeal raised a question of great importance. 'The Attorney-General had laid great stress upon the difficulties arising from the war and upon the enormous importance of having officials free to act immediately under their powers without having their actions perpetually challenged, but that

could not give to an official the right to act outside the law, nor could the law be unduly strained to allow him to do what it might be thought reasonable that he should do. In times of war Parliament should be, and generally was, in continuous session, and if the powers of an official were thought to be inadequate, further powers could be readily obtained from the Houses of Parliament. The only question was: Were those powers granted? There were only two possible sources from which the Food Controller could derive his powers. One was the words of the Act of Parliament by which he was appointed, the other the Defence of the Realm Act. Neither of these enactments enabled the Food Controller to levy any sum of money on any of His Majesty's subjects. Drastic powers were given to him in regard to the regulation and control of the food supply, but they did not include the power to levy money, which he must receive as part of the national funds. However the character of the transaction might be defined, in the end it remained that people were called upon to pay money to the Controller for the exercise of certain privileges. That imposition could only be properly described as a tax, which could not be levied except by direct statutory means. The appeal failed.'

Note.—This decision was followed in *T. & J. Brocklebank, Lim.* v. *The King*, 40 T. L. R. 237 (1924). In this case, the Ship Controller declined to grant a licence for the sale of a ship unless the suppliants paid 15 per cent. of the purchase price to the Ministry of Shipping. The imposition of this condition was held to be *ultra vires* and a levying of money for the use of the Crown without a grant of Parliament within the meaning of the Bill of Rights.[1]

[1] On taxation generally see Chalmers and Asquith, pp. 263—270.

PARLIAMENT—PRIVILEGE.

Ashby *v.* **White and others.** 2 *Anne*, 1704.

2 *Lord Raymond*, 938; 3 *Ib.* 320; 14 *St. Tr.* 695—888; 1 *Smith, L. C.* 240.

Case.] The plaintiff being duly qualified, had tendered his vote in an election of burgesses for Parliament, and this had been refused by the defendants as returning officers. Although the candidates for whom he would have voted were duly elected, the plaintiff brought an action, and laid the damages at 200*l.* He obtained a verdict, with 5*l.* damages and costs.

On motion in the Queen's Bench in arrest of judgment, on the ground that the action did not lie, judgment was given for the defendants, *Holt*, C. J., dissenting. Upon writ of error in the House of Lords this was reversed on the grounds set forth by *Holt* in the Court below.

Judgment.—The franchise is a right of a high nature. 'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.' An injury (*i.e.*, an invasion of a man's legal right) imports a damage, even if no pecuniary damage is shown. The right to vote is founded upon the elector's freehold, and matters of freehold are determinable in the King's Courts. This is a proper tribunal to try the question; 'who hath a right to be in the parliament is properly cognizable there, but who hath a right to chuse is a matter settled before there is a parliament.' And again the House of Commons cannot take cognizance of particular men's

complaints, nor can it give satisfaction in damages, nor was such a petition ever heard of in Parliament as that a man was hindered of giving his vote and praying for a remedy. Parliament would undoubtedly say 'take your remedy at law.' It is not like the case of determining the right of election between the candidates.

Held:—That an action will lie against a returning officer for refusing the vote of a duly qualified person: and that the refusal is an injury, though it be without any special damage.

The House of Lords gave judgment in Ashby's favour on the 14th January, 1704. The Commons immediately took the matter up, and after debates lasting from the 17th to the 25th January, on this latter day they passed resolutions that neither the qualification of any elector, nor the right of any person elected is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled, except in such cases as are specially provided for by Act of Parliament; and that an action in any other Court was therefore a breach of privilege. The Lords also discussed the question, and passed counter-resolutions.

Meanwhile five other 'Aylesbury men' had brought similar actions against the constables of their borough. They were thereupon committed to prison (5th Dec.) by the House of Commons for a breach of their privileges, together with their counsel and attorneys who had attempted unsuccessfully to obtain their discharge on *habeas corpus*, the majority of the judges holding, against *Holt*, C. J., that the House of Commons were the sole judges of their own privileges. The burgesses then applied for a writ of error to take the question to the House of Lords. Nevertheless the House of Commons resolved that no writ of error lay in this case, and petitioned the Queen not to grant it. The Lords also appealed to the Queen by an address, in which they showed that writs of error

from inferior tribunals were *ex debito justitiæ*, writs of right, and upon the Queen's referring the question to the judges, ten out of twelve certified to that effect. They further complained that the resolutions of the House of Commons amounted to a direct repeal of the laws protecting the liberty of the subject by means of *habeas corpus*, and prayed that she would order the writs to issue. The reply of the Queen was, that she would have granted the writs of error prayed for, but that it was necessary at once to put an end to the session, and she knew, therefore, that no further proceedings could be taken.

The prorogation of Parliament set the Aylesbury men and their legal advisers at liberty and left them free to pursue their legal remedies, without the intervention of privilege, and they obtained verdicts and execution against the returning officer.

Note.—Apart from the discussion of the privileges of Parliament which arose out of this case, it is probably of greater importance as illustrating the maxim '*ubi jus ibi remedium*,' and the principle that the mere novelty of a complaint in an action on the case was in itself no answer to the action, if it were based upon an invasion of a right recognized as such by the law. In these respects *Ashby* v. *White* will be found fully commented on in Smith's Leading Cases. The case is also of interest in connection with the duties and liabilities of a returning officer. It is observed in *Tozer* v. *Child*, 1857,[1] that the report of this case in Raymond is defective in failing to show that *Holt*, C. J. based his judgment on the fraud and malice of the defendant. A fuller form of the judgment was published from a manuscript in 1837, and here, indeed, this point is directly dealt with, as *Holt*, C. J., there states that malice was charged by the plaintiff in his declaration and so found by the jury. It has indeed since been held that if a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuses to receive the vote of a person entitled to vote at an election no action will lie against him as, acting in a quasi-judicial capacity, he is protected if he acts honestly (*Tozer* v. *Child*, *supra*). It would appear that in such a case the right of the voter as against the returning officer is not an absolute right to have his vote recorded, but, as was suggested by *Bramwell*, B.,

[1] 26 L. J. Q. B. 151; 7 E. & B. 377.

in *Tozer* v. *Child*, a right to have the goodness of his vote fairly considered by the officer.

It will be observed that *Holt*, C. J., expressly repudiated any claim on behalf of the Court to determine the question of disputed elections, as, when *Ashby* v. *White* was tried, it was recognized that the House of Commons alone had jurisdiction to decide such disputes, and that the sheriff in making his return as to an election was responsible only to the House; *Barnardiston* v. *Soame*, 6 St. Tr. 1063. From about 1600 to 1868 the House, sometimes as a whole, but latterly by a committee, disposed of all questions as to disputed elections, but by 31 & 32 Vict. c. 125, amended by 42 & 43 Vict. c. 75, the trial of election petitions and questions arising out of controverted elections were referred to two judges of the King's Bench Division of the High Court of Justice, who certify their finding to the Speaker.

But a returning officer, in common with all servants of the Crown, is liable for criminal acts. Thus, in *Reg.* v. *Hall*,[2] an overseer was indicted for unlawfully, wilfully, and maliciously, knowingly and corruptly omitting from the list of voters the name of one Stanley Mockett. It was laid down that an offender against a statute for the liberty and security of the subject, or for a matter of public convenience, may be sued by the party aggrieved or be indicted for contempt of the statute.

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[2] [1891] 1 Q. B. 747.

PARLIAMENT—POWER TO COMMIT.

Case of Lord Shaftesbury. 29 *Car. II.*, 1677.

1 *Mod.* 144; 6 *St. Tr.* 1269.

Case.] Lord Shaftesbury, with two other Peers, had been committed to the Tower by an order of the Lords 'during the pleasure of this House for high contempts committed upon this House.'

Some months afterwards Lord Shaftesbury was brought up in the King's Bench on a writ of *habeas corpus*, and the question of the sufficiency of the return was argued.

It was admitted that there had been many instances of commitment by each House, but the question had never been determined in a Court of law.

Judgment.—The judges declared that the return would have been held ill and uncertain in the case of an ordinary Court of Justice. But the Court was bound to respect the most High Court of Peers, and the return was not examinable in the King's Bench. It would be otherwise if the session was over.

Held:—That the prisoner must be remanded.

In the next session this application to an inferior Court was voted a breach of privilege, and Lord Shaftesbury was called upon to beg their Lordships' pardon for bringing his *habeas corpus*. This he did, and was discharged.

Burdett *v.* **Abbot.** 51 *Geo. III.*, 1811.

14 *East*, 1—163; 4 *Taunt.*, 401; 5 *Dow*, 165.

Case.] This was an action of trespass against the Speaker of the House of Commons for breaking into the plaintiff's house, and carrying him to the Tower.

The defendant pleaded that the plaintiff and himself were members of a Parliament then sitting; that it had been resolved by the House of Commons that a letter from the plaintiff in a newspaper was a breach of its privileges, and that the Speaker should issue his warrant for the plaintiff's commitment to the Tower in pursuance of which warrant the plaintiff had been arrested.

Judgment.—The case was first argued on demurrer before Lord *Ellenborough*, C. J., and the Court of King's Bench; whose judgment was affirmed on a writ of error before Sir *Jas. Mansfield*, C. J., in the Exchequer Chamber; and again affirmed in the House of Lords by Lord *Eldon*, C., and Lord *Erskine*.

Held:—That the power of either House to commit for contempt is reasonable and necessary, and well established by precedents, and that the execution of a process for *contempt* justified the breaking into the plaintiff's house.

Note.—The preceding case of Lord *Shaftesbury* shows the right of the House of Lords to commit for contempt. In *Burdett* v. *Abbot* it was placed beyond question that the House of Commons had a similar jurisdiction. There is said, however, to be this difference in the powers of the two Houses; the Lords may commit for a definite period which may extend beyond their own session, whereas a commitment by the House of Commons ceases, ipso facto, at the prorogation of Parliament.[1]

It is clear that if it appears by the warrant that the commitment was for contempt, the Court will not enquire further; if, however, as Lord *Ellenborough* said in *Burdett* v. *Abbot*,[2] it did not profess to commit for contempt but for some matter appearing on the return

[1] Anson, 1, 189. *R.* v. *Flower*, 8 T. R. 314.
[2] 14 East at p. 150.

which could by no reasonable intendment be considered as a contempt, but a ground of commitment evidently arbitrary and unjust and contrary to every principle of law or justice, then the Court would probably look into the return and act as justice might require.

In this case are set forth two alleged bases of the right to commit for contempt of Parliament. *Bayley*, J., seems to ascribe it to the character of the Commons as a Court of Record, while *Ellenborough*, C. J., is of opinion that it is to be sought in expediency. The latter is the less doubtful ground, and is approved by Anson.

Contempt of Court seems to involve two ideas, *i.e.*, contempt of the power and of the authority of the Court. The first refers to the ability to enforce its orders, the latter to its jurisdiction to declare the law and the rights of the parties. According to Viner, every Court of Record can commit for contempt of itself.

It may be observed that it has been held in the Privy Council that the *lex et consuetudo parliamenti* do not belong to the supreme legislative assembly of a colony, and that colonial Parliaments have no right to punish by imprisonment for contempts committed within their walls. *Doyle* v. *Falconer*, 1866; L. R. 1 P. C. 328; 4 Moo. P. C. N.S., 203; or beyond them, *Kielley* v. *Carson*, 1842; 4 Moo. P. C. 63; and *Fenton* v. *Hampton*, 1858; 11 Moo. P. C. 347. Any such authority, therefore, must rest upon statute, and has in some cases been conferred; see *Speaker of Legislative Assembly of Victoria* v *Glass*, 1871; L. R. 3 P. C. 560. In Victoria the Assembly has the power to commit by virtue of a clause in its constitution statute, and the same applies in the case of the Legislative Assembly of Nova Scotia (*Fielding and others* v. *Thomas*, [1896] App. Ca. 500). In *Harnett* v. *Crick*, [1908] A. C. 470, a resolution, under the Constitution Act, by the Legislative Assembly of New South Wales, suspending a member, passed to defend the regularity of the proceedings of the House and not by way of punishment, was upheld by the Judicial Committee. The power of expelling disorderly persons they possess of course, but this is not peculiar to them; as Lord *Abinger*, C. B., has said, 'every person who administers a public duty has a right to preserve order in the place where it is administered, and to turn out any person who is found there for improper purposes.' [3]

Compare the case of the *Sheriff of Middlesex*, *infra*, p. 44, and note.

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[3] *Jewison* v. *Dyson*, 1842, 9 M. & W. 540, at p. 586.

PARLIAMENT—FREEDOM OF SPEECH.

Rex *v.* **Eliot, Holles and Valentine.** 5 *Car. I.*, 1629.

Cro. Car., 181; 3 *St. Tr.* 294.

Case.] This was an information by the Attorney-General against Sir John Eliot, Denzil Holles, and Benjamin Valentine, for seditious words spoken in the House of Commons, of which they were members, and for a tumult in the same place.

The defendants, by their plea, denied the jurisdiction of the Court, on the ground that offences done in Parliament could only be punished in Parliament, and they refused to plead any other plea.

Judgment.—After arguments in which the whole question of the privilege of free speech in Parliament was discussed, the defendants relying, among other things, upon the Act passed 4 Hen. 8, in *Strode's Case*, the judges, *Hyde*, C. J., *Jones*, *Whitlocke*, and *Croke*, held that an offence committed in Parliament against the King or his Government, may be punished out of Parliament, and that the Court of King's Bench had jurisdiction.

The defendants' plea was overruled, and they were thereupon sentenced to pay heavy fines, and to imprisonment during the King's pleasure.

In 1641 the Long Parliament passed a resolution that the exhibiting of this information was a breach of the privilege of Parliament.

In 1667 the Commons and the Lords passed resolutions that the judgment was illegal, and also that the Act of Parliament, commonly called Strode's Act, is a general law declara-

tory of the ancient and necessary rights and privileges of Parliament.

The Lords further ordered that the proceedings in the King's Bench should be brought before them by a writ of error, and on the 15th of April, 1668, it was ordered 'that the said judgment shall be reversed.'

Note.—In 1512 Strode and others had been fined in the Stannary Court, and imprisoned in default, for having, 'with other of this House,' introduced into Parliament certain bills which the tinners did not like. It was enacted,[1] on his petition, that the judgment and execution should be void, and further, that all suits, &c., against him 'and every other of the person or persons afore specified, that now be of this present parliament or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring, of any matter or matters, concerning the parliament to be communed and treated of, be utterly void and of none effect.'

It seems to have been doubted, however, whether this Act was intended to be of general application or only to meet *Strode's* case. The Speaker—*prolocutor*—spoke for the Commons in the Parliament Chamber, and he alone had the right of speech. Until the Commons were housed within the precincts of Parliament in 1547, the Speaker only claimed liberty of speech for himself. Since that year, the Speaker claimed liberty of speech not only for himself but for the House, and it became customary, at the opening of each Parliament, for the Speaker to include freedom of speech in his demand for confirmation of the 'ancient and undoubted rights and privileges' of the Commons; but the claim, to its fullest extent, does not appear to have been admitted by the Crown, at any rate in practice. In answer to the usual demand of the Speaker in 1592-3, Lord Keeper Sir John Puckering, in the course of his speech, said: 'For libertie of speech her majestie commandeth me to tell you, that to say yea or no to Bills, God forbid that any man should be restrained or afrayde to answear accordinge to his best likinge, with some short declaracion of his reason therein, and therein to have a free voyce, which is the verye libertie of the house, not as some suppose to speake there of All causes as him listeth, and to frame a forme of Relligion or a state of gouvernment as to their idle braynes shall seem meetest, she sayth no King fitt for his state will suffer such absurdities.'[2]

[1] 4 Hen. 8, c. 8.

[2] Owing to summarized versions of this speech only having been published,

The above case of *Eliot, Holles & Valentine* was the last instance in which the privilege of freedom of speech in Parliament was questioned. By the Bill of Rights[3] it was declared 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.' In an action of slander brought against Mr. A. Balfour, then Chief Secretary for Ireland, the Court, being satisfied that the only words spoken by the defendant about the plaintiff were spoken by him in Parliament, ordered all proceedings in the action to be stayed.[4] Words spoken in Parliament itself are *absolutely* privileged, that is, the privilege is not lost, however malicious or false the words may have been. But this only applies to words there spoken, and if a member of Parliament chooses to repeat or publish a slanderous speech which he has made in Parliament, he is not absolutely protected, and damages may be recovered against him if it can be shown that he is acting maliciously or from an improper motive, or that the report of the speech published by him was not fair or accurate.[5]

As to the general right of publication of Parliamentary proceedings, see pp. 40-3, *post*.

If an ordinary offence against the law, as *e.g.*, an aggravated assault, were committed by a member of Parliament within the walls of Parliament, there is no authority for saying that such an offence would not be cognizable by the ordinary Courts.[6]

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the Lord Keeper's answer has been misunderstood. For the full version from which the above extract is cited, see J. E. Neale, xxxi., English Hist. Rev. 128.

[3] 1 W. & M., Sess. 2, c. 2.

[4] *Dillon* v. *Balfour*, 20 L. R. Ir. 600.

[5] *R.* v. *Lord Abingdon*, 1 Esp. 226. *R.* v. *Creevey*, 1 M. & S. 273. See also *Wason* v. *Walter*, *infra*, p. 157.

[6] See *Bradlaugh* v. *Gossett*, 12 Q. B. D. at p. 283; 53 L. J. Q. B. 209; 53 L. T. 620; 32 W. R. 552; 2 Hallam Const. Hist. (8th ed.), p. 6.

PARLIAMENT—FREEDOM FROM ARREST.

Goudy *v.* **Duncombe.** 1 *Exch.* 430 (1847).

Case.] Duncombe had been taken in execution for default in payment of a debt secured by a judge's order and had been discharged from custody. He was elected a member of Parliament on the 28th July, 1847. The House of Commons was dissolved the 23rd July, and on the 13th August, Parliament was prorogued to the 12th of October. He was arrested on the 2nd September.

Judgment.—Upon the authorities the Court found that the privilege of a member of the House from arrest during the continuance of the session extends to a period of forty days before and after a meeting of Parliament, and that the privilege whether after a prorogation or a dissolution applies to a person who was a member of the old Parliament but is not a member of the new Parliament.

Note.—The period of forty days, as *Pollock*, C. B., said, had for about two centuries at least, been considered either a convenient time or the actual time to be allowed. It was no doubt derived from the provisions in c. 14 of Magna Carta, for formal notice of at least forty days in the summons to Parliament. But the privilege did not extend to freedom from arrest for treason, felony or breach of the peace, nor from attachment for contempt of court. In modern times members committed by the Courts for contempt have failed to obtain release by virtue of privilege. In 1831 Mr. Long Wellesley, having taken his infant daughter, a ward in Chancery, out of the jurisdiction of the Court, was committed for contempt by Lord Chancellor *Brougham*. Other cases are Mr. Lechmere Chalton in 1837; Mr. Whalley in 1874; Mr. Gray in 1882; and Mr. McHugh in 1902. But neither House has waived its right to interfere, and every case is still open to consideration upon the merits.[1]

[1] See May, Parl. Practice, 12th ed. 116.

PARLIAMENT—PUBLICATION OF PROCEEDINGS.

Stockdale *v.* **Hansard.** 2 *Vict.* 1839.

9 *Ad. & E.* 1; *Broom, Const. L.* 875—983.

Case.] A book published by the plaintiff had been described by two inspectors of prisons in a report to the Government as 'disgusting and obscene.' This report was printed and sold by the defendants by order of the House of Commons. The plaintiff brought an action for libel, claiming 5000*l.* damages.

The defendants pleaded that they had printed and sold the report only in pursuance of the order of the House of Commons, that the report having been presented to and laid before the House it became part of the proceedings of the House, and that the House had resolved 'that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons House of Parliament as the representative portion of it.'

To which the plaintiff demurred, that the known and established laws of the land cannot be superseded or altered by any resolution of the House of Commons, nor can that House by any resolution create any new privilege inconsistent with the law.

Argument.—It was argued by the defendants, who had been directed by the House to plead to the action merely to inform the Court, that the act complained of was done in exercise of its authority, and in the legitimate use of its privileges: that the Courts of law are subordinate to the Houses of Parliament, and are therefore incompetent to decide questions

of Parliamentary privilege. But if the Court were competent to inquire into the existence of the privilege, it could be shown to have long existed.

Judgment: per Lord *Denman,* C. J.:—

Parliament is supreme: but neither branch of it is supreme by itself; the House of Commons is only a component part of Parliament. The resolution of any one of the three legislative estates cannot alter the law or place any one beyond its control. The claim for an arbitrary power to authorize the commission of any act whatever is abhorrent to the first principles of the Constitution. The privilege of each House may be the privilege of the whole Parliament, but it does not follow that the opinion of its privileges held by either House is correct or binding. There are many cases where the Law Courts have discussed questions of Parliamentary privilege.

Nor has it been shown that the privilege of publication exists. Here the publication of the opinions referred to was not in relation to any matter before the House, and more copies were ordered to be printed than were necessary for the use of its members.

Littledale, Patteson and *Coleridge,* JJ., concurred.

Held:—That the House of Commons, by ordering a report to be printed, could not legalize the publication of libellous matter, and there must be judgment for the plaintiff.

Note.—In consequence of these proceedings, an Act, 3 & 4 Vict. c. 9, was passed, in virtue of which any person called upon to defend an action in respect of the publication of any reports, papers, votes, or proceedings of either House of Parliament ordered by either House, may bring before any Court of law in which such proceeding has been commenced, a certificate from the Lord Chancellor, or the Clerk of the Parliaments, or the Speaker of the House of Commons, or the clerk of the same House, that the publication was under the authority of the House of Lords or the House of Commons, and such Court or judge shall thereupon stay all such proceedings. And this is to apply also to all extracts from any paper thus printed, published *bonâ fide* and without malice. This Act of course settled the question, not in itself of the greatest importance, which had given rise to this memorable case

But far greater issues were involved, and upon those issues *Stockdale* v. *Hansard* remains, and it is to be hoped ever will remain, a binding authority. It was of this case that *Cockburn*, C.J., in his judgment in *Wason* v. *Walter*, spoke as follows:—'From the doctrines involved in this defence, namely that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold. To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion.'

Whilst the publication of all reports, votes and proceedings published by order of either House of Parliament is absolutely privileged, in case of the publication of extracts or abstracts the privilege is qualified. It was held in *Mangena* v. *Wright* [1909] 2 K. B. 958 that a person who *bonâ fide* and without malice prints or publishes an extract from or an abstract of a Parliamentary paper, though in so doing he does not act by or under the authority of Parliament, is protected by sec. 3 of the Act of 1840. And where an allegation is made against a person in a privileged document, *e.g.*, in a Parliamentary paper, a comment on that allegation by a person who is not the person making the allegation may be fair comment, even though the allegation be untrue. A communication by a public servant of a matter within his province concerning the conduct of a person who is for the time being taking a public part, the matter being one of public interest, as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public. Wright was the printer and publisher of the *Times*.

A headline which is not part of the report is not privileged. As *Vaughan-Williams*, L. J., said in *Mangena* v. *Edward Lloyd, Ltd.*, L. T. 824 (1908): 'There was no pretence for saying that the statutory protection applied to a headline.' Here the headline to the report was 'Petition to the King—Natal Agent-General Denounces

Mangena.' The jury found that the matters complained of were libellous, that the defendants published *bonâ fide* and without malice, and that the statements in the report as published by the defendants were not true, and gave 100*l.* damages. *Darling*, J., gave judgment for the defendants on the ground that they were protected by sec. 3 of the Act. On appeal, it was held by the Court of Appeal that the finding of the jury was a general finding, which included the headline, and judgment must be entered for the plaintiff.

PARLIAMENT—CONTROL OVER ITS OWN PROCEEDINGS.

Sheriff of Middlesex's Case. 3 *Vict.*, 1840.

11 *Ad. & E.* 273; *Broom, Const. L.* 961—967.

Case.] This case arose out of *Stockdale* v. *Hansard.* The Sheriff of Middlesex, in pursuance of a writ from the Queen's Bench, had levied execution upon property of the Messrs. Hansard. The House of Commons thereupon committed him for contempt. A writ of *habeas corpus* having been obtained the Sergeant-at-Arms of the House of Commons made a return that he had detained the Sheriff under a warrant of commitment directed to him by the Speaker, and he set forth the warrant. That document stated that the House had resolved that the Sheriff, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms; but it did not set forth what the contempt was. Upon motion to discharge the Sheriff on *habeas corpus*, Lord *Denman*, C. J., delivered judgment.

Judgment.—The judgment in *Stockdale* v. *Hansard* was correct. The technical objections taken to this warrant from the Speaker are insufficient. On a motion for a *habeas corpus* the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. With regard to the objection that the warrant did not set forth the facts which constituted the alleged contempt, no doubt words containing this kind of statement have appeared in most of the former cases but not in all. The House has power to commit for contempt, and we must suppose that it adjudicated with sufficient reason. The Sheriff must therefore remain in custody.

Held:—That a Court of law cannot inquire into the grounds of a commitment for contempt by the House of Commons because the warrant of commitment does not specify the grounds upon which the person committed had been adjudged guilty of contempt.

Note.—Compare the earlier cases of *Burdett* v. *Abbot*, 1811 (*supra*, p. 34), and *R.* v. *John Cam Hobhouse*, 1820; 2 Chitty, 207. In the latter case the Court said: 'The House of Commons have adjudged (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt in having published a seditious libel, of which he has acknowledged himself to be the author. We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality.'

Howard v. *Gossett*, 10 Q. B. 359; 16 L. J. Q. B. 345, which shortly followed, was a somewhat similar case. The Court of Exchequer Chamber there held that the House of Commons has power to institute inquiries and to order the attendance of witnesses, and in case of disobedience to bring such witnesses in custody to the bar; that if there be a charge of contempt and breach of privilege and an order to the person charged to attend to answer it, and a wilful disobedience to that order, the House has power to take him into custody, and that the House alone is the proper judge when these powers are to be exercised; also that the House of Commons being a part of the High Court of Parliament, the supreme Court of this country, no mere objections of form can be taken to its warrants, as can be done in the case of warrants of justices, but that wherever the contrary does not plainly and expressly appear by the warrant itself it is to be presumed that the House has acted within its jurisdiction.

Bradlaugh *v.* **Gossett.** 48 *Vict.*, 1884.

12 *Q. B. D.* 271; 53 *L. J. Q. B.* 209; 53 *L. T.* 620.

Case.] This was an action against the Serjeant-at-Arms, who had been directed by the House of Commons to remove the plaintiff from the House until he should engage not further to disturb the proceedings. The plaintiff asked to have that order declared to be void as beyond the power and jurisdiction

of the House to make, and an order restraining the defendant from preventing the plaintiff from entering the House and taking the oath as a member.

The defendant demurred, on the ground that the statement of claim disclosed no cause upon which an action could be maintained, and the demurrer was argued before *Coleridge*, C. J., *Mathew* and *Stephen*, JJ., who allowed the demurrer.

Held:—That the House of Commons is not subject to the control of the Law Courts in matters relating to its own internal procedure only. What is said or done within its walls cannot be inquired into elsewhere. The House of Commons cannot, by resolution, change the law of the land, but Courts of law have no power to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House an act which he may have a right by law to do.

NOTE II.—ON PRIVILEGE OF PARLIAMENT AND THE COURTS.

The whole subject of the Privilege of Parliament is much too large to be treated in a short note.[1] But we must not omit to consider what is for our purpose the most interesting aspect of the subject, and one of the most difficult questions in constitutional law, viz. the extent to which Courts will adjudicate upon matters of privilege. The violent controversies produced by this question between the House of Commons and the Courts are indicated in the cases cited above.

Each House of Parliament claims to be the sole judge of its own privileges and of what constitutes a breach of them. The Courts have always admitted that the House of Commons possesses that authority to commit summarily for contempts which exists in every superior Court of law;[2] and the judges always give a liberal construction to the warrants of such commitments, which are not reversible upon mere matters of form. But this has not contented the House of Commons. They have not thought it sufficient to enforce their undoubted privileges, but have at various times claimed in effect a power of legislation by asserting an exclusive right to entertain all questions connected with privilege; and that the Courts should act ministerially only in matters of privilege, accepting or enforcing any declaration of either House. They have even denied that the judges could ascertain what is the law of privilege, as though it were a matter of inspiration vouchsafed only to themselves.[3]

The opinions of the judges in the matter have varied very much. During the eighteenth century the tendency was strong in favour of declining to decide questions of privilege in any way, and the natural result followed, that privilege was pushed to an extravagant extent. The House of Commons constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body.[4] Even in the case of

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[1] Cox, Inst. Eng. Gov. pp. 204 *et seq.* May, Parl. Prac. (12 ed.), 66.

[2] Per *Ellenborough*, C. J., in *Burdett* v. *Abbot*, 14 East at p. 138, and cp. Lord *Erskine* in the House of Lords on the same case, 5 Dow, at p. 200.

[3] Argument of Attorney-General, in *Stockdale* v. *Hansard*, 9 A. & E. at p. 31.

[4] *Denman*, C. J., in *Stockdale* v. *Hansard*; and for some flagrant instances, see 9 A. & E., p. 12. Amongst them were the following, which were all treated as breaches of privilege, with the result that the offenders either had to make

Ashby v. *White*, however, *Holt*, C. J., expressly asserts the right and duty of the Courts to know the law of Parliament as part of the law of the land. And the later decisions have been much more favourable to the right of the Courts to entertain questions of privilege. For this *Stockdale* v. *Hansard* is the leading authority. There Lord *Denman*, C. J., lays down that although the House of Commons has a right to declare what are and have been its privileges, it may not under cover of a declaration create any new privilege. That would be to give to the resolution of a single branch of the Legislature the force of a legislative enactment. It is true that the House of Commons disclaim the power to make new privileges. But the claim the House does assert will amount to the same thing, if its members alone are competent to declare the extent of their privileges, and if a Court of law is concluded from going behind their declaration.[5]

Lord *Denman* also points out that 'it must be remembered that during the session privilege is more formidable than prerogative, which must avenge itself by indictment or information involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes.'

The present condition of the question is, according to Sir Erskine May, unsatisfactory. 'Assertions of privilege are made in Parliament, and denied in the Courts; the officers who execute the orders of Parliament are liable to vexatious actions; and if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the Courts, can only be coerced by an unpopular exercise of privilege which does not stay the actions.'[6] He suggests that a statute analogous to the Act of 1840, by which collisions between Parliament and the Courts might be prevented should be passed. 'It is not desired that Parliament should, on the one hand, surrender any privilege that is essential to its dignity, and to the proper exercise of its authority; nor, on the other,

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satisfaction or were taken into custody :—Impounding a member's cattle, lopping his trees, detaining his goods, serving his tenant with process, taking his horse from a stable and riding it, digging his coal, ploughing his land, killing his rabbits, assaulting his porter, fishing in his pond, erecting a fence on his waste. On one occasion an attorney was committed for delivering an exorbitant bill of costs for the preparation of a petition to the House and for threatening to sue for the amount.

[5] The true distinction is made by Lord *Clarendon*, who construes the doctrine that the House of Commons are the only judges of their own privileges, to mean that they are the only judges in cases where their privileges are offended against, and not that they only can decide what are and what are not their privileges. 1 Hist. Rebellion, pp. 562-564.

[6] Parliamentary Practice (12 ed.), p. 138.

that its privileges should be enlarged. But some mode of enforcing them should be authorized by law analogous to an injunction issued by a Court of Equity to restrain parties proceeding with an action at common law . . . and that such prohibition should be binding, not only upon the parties, but upon the Courts.'

ALLEGIANCE.

Calvin's Case. 6 *Ja. I.*, 1608.

4 *Rep.* 1; 2 *St. Tr.* 559; *Broom, Const. L.* 4—26.

Case.] James I. was anxious that the union of the two crowns should confer mutual naturalization upon his English and Scotch subjects; and when the English House of Commons was unwilling that this should be so, the question was raised by two collusive actions in the name of Robert Calvin, a *postnatus* of Scotland, *i.e.*, one born after the union of the crowns. One of these actions was brought in the King's Bench claiming that Calvin was entitled to certain freehold land in England (which he could not then be if he were an alien), and the other in Chancery for the title deeds of the estate. The defendants pleaded in abatement that Calvin was an alien. On a demurrer to this plea the case was argued in the Exchequer Chamber before the *Lord Chancellor* and twelve judges.

Allegiance is the obedience due to the Sovereign; and persons born in the allegiance of the King are his natural subjects, and no aliens. This natural allegiance is not limited to any spot—*nullis finibus premitur*—and is due to the King in his natural capacity, rather than his politic, of which he has two, one for England, and one for Scotland. One allegiance is due by both kingdoms to one Sovereign.

The point is, whether internaturalization follows that which is one and joint, or that which is several; for if the two realms were united under one law and Parliament, the *postnatus* would be naturalized. As it is, the King is one; but the laws and Parliament are several.

Held:—That the plea was bad; it following that the *postnati* were not aliens, and might therefore inherit land in England.

NOTE III.—ON ALLEGIANCE AND ALIENS.

Note.—The reasons given for the decision in *Calvin's Case* were to some extent based upon the somewhat exaggerated notions of 'divine right' characteristic of the Stuarts, and of many lawyers of that time. By the Act of Union, however, which has united the two kingdoms into one, much of the learning involved has been rendered unnecessary and obsolete. Allegiance is defined by Coke to be 'a true and faithful obedience of the subject due to his sovereign.' It is correlative with protection, and so ceases when the sovereign can no longer *de jure* protect his subjects;[1] thus allegiance is changed by conquest, or by cession of territory under a treaty.[2] It is not governed by locality, but clings to the subject wherever he is: *nemo potest exuere patriam.* And it is indefeasible—its obligation is for life. This was the earlier common law doctrine as to allegiance, but it has been much modified by modern legislation.

The law of nationality now rests upon the common law and three statutes of 1914, 1918, and 1922, which are now printed as one statute and cited as the British Nationality and Status of Aliens Acts, 1914 to 1922. At common law, with certain exceptions, all persons born within the British Dominions are natural-born British subjects. By the Act the following persons are deemed to be natural-born British subjects, viz.:—

'(a) Any person born within H.M.'s dominions and allegiance;

'(b) Any person born out of H.M.'s dominions whose father was at the time of that person's birth a British subject and who fulfils any of the following conditions, *i.e.*:—

'(1) his father was born within H.M.'s allegiance; or

'(2) his father was a person to whom a certificate of naturalisation had been granted; or

'(3) his father had become a British subject by reason of any annexation of territory; or

'(4) his father was at the time of that person's birth in the service of the Crown; or

'(5) his birth was registered at a British consulate within one year, or in special circumstances, with the consent

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[1] 'Allegiance is the tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject.' 1 Bl. Comm. 366.

[2] Forsyth, 'Cases and Opinions on Constitutional Law,' p. 334.

of the Secretary of State, two years after its occurrence, or in the case of a person born on or after the first day of January, 1915, who would have been a British subject, if born before that date, within twelve months after the first day of August, 1922; and

'(c) Any person born on board a British ship whether in foreign territorial waters or not.'

It will be observed that now British subjects living abroad, whether natural-born or not, can extend British nationality to their descendants born abroad in perpetuity, provided they comply with the provisions of the Act relating to registration.

In *Carleback's Case* [1915] 3 K. B. 716, it was held that under the Act of 1870 a naturalized British subject could not transmit his nationality to his children born abroad, who consequently became aliens. It is the better opinion that the inhabitants of conquered territory do not cease to be the subjects of their former Sovereign by annexation accomplished during the war. A complete title can only be acquired either through the cessation of hostilities or by a treaty of peace Nevertheless this principle was not observed by the Judicial Committee of the Privy Council in *Gout* v. *Cimitian* [1922] A. C. 105. The plaintiff was born in 1878 in the Ottoman Dominions, and went to reside in Cairo in 1893. In December, 1913, he went to Cyprus, where he resided twenty-three months. It was held that as he was ordinarily resident and actually present in Cyprus at the date of the annexation on 4th November, 1914, he was a British subject.

Aliens may still acquire British nationality by special Act of Parliament or may become denizens by grant of letters of denization by the Crown. By the Naturalization Act of 1870 an alien who had resided in the United Kingdom for a term of not less than five years or had been in the service of the Crown for a like period, might apply for a certificate of naturalization. Upon the grant of such certificate he became entitled to all the political rights, powers and privileges, and subject to all the obligations of a natural-born British subject, but he was not to be deemed a British subject unless he had ceased to be a subject of his former State. The certificate did not take effect until the applicant had taken the oath of allegiance.

Although the Act stopped short of expressly declaring that naturalized aliens should be deemed to be natural-born British subjects, it seems clear that such was the intention. Such was the interpretation placed upon the section in *Rex* v. *Speyer* [1916] 1 K. B. 595; [1916] 2 K. B. 858, in which it was sought to exclude the defendant from the

Privy Council on the ground that he was disqualified as a naturalized alien for that office by the Act of Settlement of 1700. Prior to this Act, an alien could not become a member of Parliament, nor could he possess the parliamentary franchise. He could, however, be a Privy Councillor, since the Sovereign was not restricted at common law in his choice of councillors. But upon naturalization he acquired all the rights, privileges and capacities of a natural-born British subject.

By sec. 3 of the Act of Settlement, however, no person born out of the realm or dominions (although naturalized or a denizen, except born of English parents), was eligible to the Privy Council or to either House of Parliament, or to certain specified offices.

By sec. 3 of the Act of 1914, a person to whom a certificate of naturalization is granted, subject to the provisions of the Act, is entitled to all political and other rights, powers and privileges, and subject to all obligations, duties and liabilities to which a natural-born British subject is entitled or subject, and as from the date of his naturalization to have to all intents and purposes the status of a natural-born British subject.

It was further provided by this section that 'Section 3 of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words "naturalized or" were omitted therefrom.'

It was held, therefore, that sec. 3 of the Act of Settlement was repealed by implication by sec. 7 of the Act of 1870 *quoad* naturalized aliens; that sec. 3 of the Act of 1914 had not revived *quoad* naturalized aliens the disqualification for membership of the Privy Council contained in the Act of Settlement; and that Sir Edgar Speyer upon naturalization was capable of being a Privy Councillor. The Court expressed the view that the wording of the statute was not very happy. The disqualification, however, of denizens still continues, and for this reason denization by letters patent, though preserved by sec. 25 of the Act of 1914, is likely to fall into disuse.

When naturalization was effected by Act of Parliament it was usual, in the case of any distinguished foreigner, to repeal sec. 3 of the Act of Settlement so far as he was concerned.

The grant of a certificate of naturalization lies in the absolute discretion of the Secretary of State. He may make such grant if he is satisfied that the applicant has either resided within the British dominions for a term of not less than five years, or been in the service of the Crown for a like term; is of good character and has an adequate knowledge of the English language; and intends to reside in the British dominions or enter or continue in the service of the Crown.

The residence prescribed is residence in the United Kingdom for not less than one year and previous residence either in the United Kingdom or in some other part of the British dominions for a period of four years within the last eight years before the application. A certificate has no effect until the applicant has taken the oath of allegiance.

By complying with the provisions relating to naturalization contained in the principal Act, the Government of any British possession may confer upon aliens residing in its territory imperial naturalization, *i.e.*, the status of a natural-born British subject in any part of the British Empire. The powers of the British Secretary of State may be exercised by such Government upon the same terms *mutatis mutandis*, and in those possessions in which another language is officially recognized with English, an adequate knowledge of either language may be accepted. The dominions of Canada, Australia, and Newfoundland have adopted this part of the principal Act. But where a possession has not adopted the Act, a person naturalized by the Government of such possession is not a British subject within the United Kingdom. This point was raised during the war of 1914 under the Act of 1870, by which the Legislature of a British possession was empowered to make laws 'for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession.' In *Rex* v. *Francis, Ex parte Markwald* [1918] 1 K. B. 617, Markwald was born in Germany in 1859 and in 1878 went to Australia, where, in 1908, he took the oath of allegiance and was granted a certificate of naturalization under the Australian Act, 1903. He subsequently came to reside in London and was charged and convicted of being an alien. It was held that taking the oath of allegiance and the grant of a certificate did not make Markwald a British subject in the United Kingdom.

'A man,' said *Darling*, J., 'may become the liege subject of the King in some parts of his dominions, yet not in all; and wherever he is not a subject, he is an alien.' As was said, Markwald's allegiance was local allegiance. No authority had been given by the Sovereign power to anyone to accept any wider allegiance from him. When every British possession has adopted the Act this partial British citizenship will cease to exist. In the meantime the anomaly remains, since a possession may admit aliens to its citizenship upon terms which are not acceptable in the United Kingdom. (See also *Markwald* v. *Att.-Gen.* [1920] 1 Ch. 348).

Although the status of a naturalized person has been raised to an equality in general terms with that of a natural-born subject, yet in other respects it has been substantially modified to his disadvantage.

By sec. 7 of the principal Act, absolute discretion has been conferred upon the Secretary of State to revoke the certificate of naturalization if he is satisfied that the person to whom the certificate has been granted has shown himself, by act or speech, to be disaffected or disloyal. Such act may be indicated by the naturalized person who (a) during war has unlawfully traded or communicated with the enemy or with the subject of an enemy State, or engaged in or associated with any business so as to assist the enemy; or (b) has within five years of the grant of the certificate been sentenced by any Court in His Majesty's dominions; or (c) was not of good character at the date of the grant of the certificate; or (d) has been ordinarily resident out of His Majesty's dominions not less than seven years since the grant, without maintaining substantial connection with such dominions; or (e) remains according to the law of the State at war a subject of that State. A person refusing or neglecting to deliver up his certificate after revocation is liable to a fine not exceeding one hundred pounds.

Disaffection and disloyalty are vague terms and may be compared with the obsolete doctrine of constructive treason. The provisions relating to a clean record and good character prior to the grant as conditions of the retention of the status of a British subject are new in English law. A clean record is quite a reasonable requirement. Every State is entitled to reject persons convicted of serious criminal offences. But 'good character' is somewhat vague and is capable of causing injustice. Referring to these provisions, Mr. Bentwich says experience alone will show whether it will be desirable to retain the idea of nationality conditional on good behaviour and on keeping in close touch with the British dominions as a permanent class of citizenship.

The revocation of a certificate does not affect the status of the wife and minor children, unless the Secretary of State otherwise expressly directs. But the wife may make a declaration of alienage, whereupon she and the children cease to be British citizens. If, however, the wife is a natural-born British subject, the Secretary of State may not direct revocation of her status.

British nationality may be lost either by naturalization in a foreign State or by a declaration of alienage. The maxim *Nemo potest exuere patriam* prevailed until the Act of 1870, by which it was enacted that any British subject who should become naturalized, or had already become naturalized, in a foreign State should cease to be a British subject. This 'right of expatriation' is substantially re-enacted by the principal Act. By section 13, a British subject automatically ceases to be such by voluntary naturalization in a foreign State; and

by section 14, any person who by birth within the British dominions and allegiance, or on board a British ship, is a natural-born British subject, and also the subject of a foreign State, if of full age and not under disability, may make a declaration of alienage. And any person who, though born out of the British Dominions, is a natural-born British subject, may do likewise and each shall cease to be a British subject.

But to this there is one important exception. Such a person cannot put off his *patria* in time of war either by naturalization in the enemy State or in a neutral State, or by a declaration of alienage. The decision in *R.* v. *Lynch* [1903] 1 K. B. 444 was followed by the Courts during the War in *Vetch* v. *Taylor*, 116 L. T. 444 (1917); *Ex parte Freyberger* [1917] 2 K. B. 129; and *Gschwind* v. *Huntington* [1918] 2 K. B. 420.[1]

On the other hand, where a British natural-born subject during the War was naturalized in Germany, it was held in *Re Chamberlain's Settlement* [1921] 2 Ch. 533, that he was a German subject for the purposes of the execution of the provisions of the Treaty of Versailles, 1919, since the question whether a person was 'a German national' within the meaning of Art. 297 of the Treaty and of the Order in Council of 18th August, 1919, was to be determined exclusively by German municipal law.

British nationality acquired by naturalization is lost by a declaration of alienage where a convention exists with the country of origin permitting the subjects of that country to divest themselves of the status of British nationality.

It may be noted that the loss of such nationality does not relieve the denationalized person from any liability incurred before such loss.

Fundamental changes in family relations have also been created by the new statute. By sec. 10, 'the wife of a British subject shall be deemed to be a British subject and the wife of an alien shall be deemed to be an alien: Provided that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality and thereupon she shall be deemed to remain a British subject.'

In one respect this section is open to grave objection. The result is that if a British woman marries a stateless person, she also becomes stateless. Under the common law, a British woman upon marrying an alien retained her British nationality, and this was not affected by the

[1] See also *De Jager* v. *Att.-Gen. of Natal* [1907] A. C. 326.

Act of 1844. By the Act of 1870, however, upon marriage with an alien she became the subject of the State of which her husband was a subject, but if her husband was stateless she retained her British nationality under the common law.

Statelessness has long been recognized in international law, but in England no attention was paid to this question until in *Ex parte Weber* [1916] 1 K. B. 280 *n.*; [1916] A. C. 421, *Phillimore*, L. J., doubted whether a person could be stateless. But in *Stoeck* v. *The Public Trustee* [1921] 2 Ch. 67, *Russell*, J., recognized the existence of statelessness as a legal fact in English law. By sec. 11, a woman who, having been a British subject, by marriage becomes an alien, shall not by the death of her husband or by the dissolution of the marriage cease to be an alien and, conversely, an alien woman who by marriage becomes a British subject does not under similar conditions cease to be a British subject. The rule having been established that the wife takes her husband's nationality, it was thought desirable to state with precision that the death of the husband or the dissolution of the marriage did not *ipso facto* cause any change in the status of the wife. It is otherwise with a decree of nullity, in which case the woman regains her former nationality, since, if there is no marriage, the woman has not acquired the nationality of the man.

The disability, however, of a British subject to change his nationality during war does not apply to a natural-born British woman upon marriage with an alien, even though the alien be an enemy. In *Fasbender* v. *Att.-Gen.* [1922] 2 Ch. 850, where a British-born woman married a German after the Armistice, but before the ratification of the Treaty of Versailles, 1919, it was held that she became a German upon her marriage, and consequently her property became subject to attachment as that of a German.

By sec. 12, the minor children of a British subject who loses his British nationality by declaration of alienage or otherwise, cease to be British subjects, if by the law of any other country they become naturalized in that country. That this section has failed to solve the anomaly of double nationality is illustrated by the case of *Atkinson* v. *Recruiting Officer* (*Bury St. Edmunds*), 116 L. T. 305 (1917). In this case the appellant was born at Chicago in 1889, his father being a natural-born British subject. In 1896, his father became a naturalized American citizen, and within a few months the appellant came to England, where he continued to reside. By American law the naturalization of the father confers American citizenship upon the minor children 'if such citizenship shall begin at the time such minor children begin to reside permanently in the United States.'

Upon the facts it was held that the appellant did not begin to reside permanently in the United States, and that consequently he was not an American citizen. And since, at the time of his birth, his father was a natural-born British subject, the appellant was a British subject. The point, however, was not taken that by sec. 1992 of the Revised Statutes of the United States, the appellant having been born within the allegiance and jurisdiction of the United States was an American citizen. A letter from the American embassy was, indeed, admitted in evidence, in which the opinion was expressed that the appellant was an American citizen and also a British subject. As the appellant, at the time he left the United States, was a minor and consequently could have no mind of his own, and there was no evidence of the intention of the father, it would seem impossible to say that he did not begin to reside permanently in the United States. If the appellant became automatically naturalized in the United States upon the naturalization of his father, he would appear by this section to have lost his British nationality. If not, he possessed double nationality.

REMEDY AGAINST THE CROWN.

Danby's Case. 11 *St. Tr.* 599 (1679).

Case.] The first article of impeachment for high treason against Lord Danby, Lord High Treasurer, recited that he had traitorously encroached to himself regal power by treating in matters of peace and war with foreign ministers and giving instructions to His Majesty's Ambassadors abroad without communicating the same to the Secretaries of State and the rest of the Council and against the express declaration of His Majesty and his Parliament; thereby intending to defeat and overthrow the provisions that had been deliberately made by His Majesty and his Parliament for the safety and preservation of His Majesty's kingdom and dominions. This article referred to the letter of the 25th March, 1678, from Danby to Montague, then Ambassador at the Court of Louis XIV., instructing him to conclude a secret treaty of peace with Louis. If the treaty was concluded Charles was to receive six million livres a year for three years, and so render him independent of Parliament. This letter was written by the express command of Charles and countersigned by him as follows: 'This letter is writ by my order, C. R.' Since, in virtue of the maxim, 'The King can do no wrong,' the Commons could not touch Charles, they placed the responsibility upon Danby, for although the Sovereign is personally immune, his ministers are not, whether they act under his express orders or not. In his defence Danby contended that the King's own order, as expressed in the letter itself, was sufficient to justify obedience, in any case not unlawful. 'I believe,' he said, 'there are very few subjects but would take it ill not to be obeyed by their servants, and their servants might as justly expect

their masters' protection for their obedience.' The letter 'was written by the King's command upon the subject of peace and war, wherein His Majesty alone is at all times sole judge and ought to be obeyed not only by any of his ministers but by all his subjects.' In no case, he declared, ought a Minister of State to be made a sacrifice to the will of the people. Since the charge amounted to misdemeanour only and not to felony, the Lords rejected the motion to commit Danby to the Tower. But upon the revival of the impeachment after the dissolution by the new House of Commons, the Lords made no further objection and Danby was committed. On being required to give in his written answer to the charges, Danby produced a pardon under the Great Seal given after the commencement of the proceedings with a view to their bar. The Commons protested and resolved that the pardon was illegal and ought not to be pleaded in bar of an impeachment. By such plea the Crown was made directly and personally responsible for the very same act which the Commons had made matter of impeachment. This question was ultimately set at rest by the Act of Settlement (12 & 13 Will. 4, c. 2), s. 3, whereby no pardon under the Great Seal may be pleaded to an impeachment by the Commons. The Commons also denied the right of the bishops to vote on the validity of the pardon and demanded a joint committee to regulate the form and manner of the proceedings on the impeachment. The Lords accepted the committee but resolved that the spiritual Lords had a right to sit and vote in Parliament in capital cases until judgment of death shall be pronounced. Owing to these disputes Parliament was prorogued before anything further could be done and in the next Parliament Danby's impeachment was dropped. Meanwhile Danby remained in the Tower. In 1682 on a writ of *habeas corpus* he applied for bail, which was refused by the Court on the ground of its incompetency to interfere in an impeachment which was still before the High Court of Parliament. Upon Jeffery becoming Chief Justice of the King's Bench he was bailed to appear at the Lords' Bar

the first day of the then next Parliament,[1] and in 1685 the order for impeachment was reversed and annulled.

Note.—This impeachment went a long way to establish the principle of ministerial responsibility: that a minister cannot shelter himself by a plea of obedience to the command of the Sovereign. It also illustrates that a pardon cannot be pleaded during the course of the proceedings. The prerogative of pardon can only be exercised after conviction. Further, that the proceedings on impeachment are not abated by the prorogation or dissolution of Parliament; that imprisonment by order of the Lords does not abate by the prorogation or dissolution of Parliament; and that if no overt act appears in the charge of treason or felony, the defendant must be admitted to bail.

PROPERTY.

The Case of the King's Prerogative in Saltpetre. 4 *Jac.*

12 *Rep.* 12 (1606).

se.] *It was resolved* by the Judges sitting at Serjeants' Inn
it although the King may not cut the trees of a subject
wing upon his freehold, nor take gravel for the repair of the
ng's houses, he may dig for saltpetre and take it, for salt-
re extends to the defence of the whole realm. And although
King cannot charge the subject for the making of a wall
out his own house or to make a bridge to come to his house,
ce that does not extend to the public benefit, 'when enemies
ne against the realm to the sea-coast, it is lawful to come
on my land adjoining to the same coast, to make trenches
bulwarks for the defence of the realm, for every subject
th benefit by it. And therefore by the common law every
n may come upon my land for the defence of the realm,
appears by 8 Edw. 4, 23. And in such case in such
remity they may dig for gravel, for the making of bul-
rks; for this is for the public and every one hath benefit by
but after the danger is over, the trenches and bulwarks
ght to be removed, so that the owner shall not have pre-
lice in his inheritance; and for the commonwealth, a man
ll suffer damage; as for saving of a city or town, a house
all be plucked down if the next be on fire; and the suburbs
a city in time of war for the common safety shall be plucked
wn; and a thing for the commonwealth every man may do
thout being liable to an action, as it is said in 3 Hen. 8,
15. And in this case the rule is true, *Princeps et respublica
justa causa possunt rem meam auferre.*'

In re A Petition of Right.

[1915] 3 *K. B.* 649.

Case.] In December, 1914, the military authorities took and entered into possession of certain land and buildings, the property of the suppliants, for the purpose of an aviation ground or aerodrome. The suppliants claimed that they were lawfully entitled under the Defence Act, 1842, or under the Military Land Act, 1892, or other Acts amending the same, to proper compensation. The Crown contended that the land was taken by virtue of His Majesty's Royal Prerogative and of the Defence of the Realm (Consolidation) Act, 1914, and of the Regulations thereunder, and denied that compensation was by law payable as alleged or at all.

Judgment.—*Avory*, J., found as a fact that possession and occupation of the land and premises was in the opinion of the competent military authorities necessary for the public safety and the defence of the realm. After referring to the cases of *Rex* v. *Hampden*, the *Saltpetre Case* and *Hole* v. *Barlow*, 4 C. B. (N. S.) 334 (1858), in which *Willes*, J., said: 'Every man has a right to the enjoyment of his land; but in the event of invasion the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases private convenience must yield to public necessity.' The learned judge came to the conclusion "that His Majesty, by virtue of his war prerogative, through his representatives, was under the existing circumstances entitled to take possession of the land and premises in question and still was entitled to occupy the same without making compensation." And he came to the same conclusion after considering the effect of the statutes under which the suppliants claimed compensation. This decision was affirmed by the Court of Appeal. Upon the appeal to the House of Lords [1] and after the arguments had lasted several days, the Attorney-Ge[illegible]

[1] 32 T. L. R. 699 (1916).

said he had come to the conclusion that in the special circumstances the suppliants had some ground for supposing that the Crown had proceeded under the Defence Act, 1842, which provided for compensation. The Crown therefore would pay such compensation as might be determined by arbitration. Upon those terms the appeal was allowed to be withdrawn.

In re De Keyser's Royal Hotel, Lim.; De Keyser's Royal Hotel Lim. *v.* The King.

[1919] 2 *Ch.* 197; [1920] *A. C.* 508.

Case.] The suppliants were the owners for a term of years of the De Keyser's Royal Hotel, the business of which was being carried on by Mr. Whinney as receiver for the debenture-holders. The premises being required by the War Office and negotiations having broken down over the amount of rent, possession was taken by the Army Council under the Defence of the Realm Regulations and upon the terms that compensation would be *ex gratia*, the amount to be determined by the Defence of the Realm (Losses) Commission. Whinney gave possession but rejected the reference to arbitration and claimed full compensation as of right. The premises were at first used by members of the Air Service, but when the Air Board was formed, the Air Service moved to the Hotel Cecil, and the premises were subsequently used by the Government for other sections of the War Office. They were throughout used for administrative purposes.

Peterson, J., dismissed the petition, holding that he was bound by the decision of the Court of Appeal in *In re A Petition of Right*. On the appeal it was contended by the Crown that the premises were taken by a competent military authority for the use of His Majesty by virtue of the royal prerogative and of the powers conferred by the Defence of the Realm (Consolidation) Act, 1914, and of the Regulations issued thereunder. The Crown claimed no right or interest

in the premises beyond the right to take and use them for so long as might be necessary for securing the public safety and the defence of the realm during the continuance of a state of war. They denied that any rent or compensation was by law payable either under the Defence of the Realm Act or at all. Upon the conclusion of the arguments the case was ordered to stand over for the examination of the records, from which it appeared that from a very early period to modern times the Crown had never taken the subject's land without paying for it and that there was no trace of any claim by the Crown to such a prerogative. In delivering judgment *Swinfen Eady*, M. R., declared that where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute. In the Defence Act, 1842, provision is made for payment 'either for the absolute purchase thereof or for the possession of the use thereof during such time as the exigence of the public service shall require.' Such right to payment was not abolished by the Defence of the Realm Act, 1914. He distinguished the case of *In re A Petition of Right*. In that case the taking possession of the land was justified upon the same ground as entering upon land adjoining the sea-coast to dig trenches. The aerodrome was actually required for the conduct of hostilities. It had no application to the present case, where possession of land and buildings was taken for administrative purposes. *Warrington*, L. J., delivered judgment to the same effect, and it was held (*Duke* dissenting) that the Crown is not entitled as of right, either by virtue of the prerogative, or under any statute, to take possession of the property of the subject and use it for administrative purposes in connection with the defence of the realm, without paying compensation for its use and occupation.

Judgment.—On appeal to the House of Lords the decision of the Court of Appeal was affirmed. Upon the claim made by the Crown in virtue of the prerogative Lord *Parmoor* in his judgment declared the constitutional principle to be that 'when the power of the Executive to interfere with the pro-

perty or liberty of the subject had been placed under Parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown, but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.' It was *held* therefore (1) that the suppliants were not entitled to a rent for use and occupation apart from statute, since there was no consensus on which to found an implied contract; (2) that Regulation 2 of the Defence of the Realm (Consolidation) Act, 1914, when read with sub-sec. 2 of sec. 1 of the Act, conferred no new powers of acquiring land, but authorized the taking possession of land under the Defence Act, 1842, while impliedly suspending the restrictions imposed by that Act upon the acquisition and user of land; (3) that the Crown had no power to take possession of the premises in right of its prerogative *simpliciter*; and (4) that the suppliants were entitled to compensation in the manner provided by the Act of 1842.

Robinson & Co., Lim. *v.* The King.

37 *T. L. R.* 698 (1921).

Case.] In this case the Food Controller requisitioned a quantity of bran and pollards, the property of the suppliants. The Minister and the suppliants were unable to agree on the price or on the tribunal by which the price should be determined. The suppliants accordingly presented a petition of right in which they prayed for a decision on these points. It was contended for the Crown that the requisition was made under Reg. 2B of the Defence of the Realm Act, and that the suppliants were legally entitled to have the price determined by the Defence of the Realm (Losses) Commission. It appeared, however, that the Commission had refused to entertain the present case.

Judgment.—The Court came to the conclusion that the sup-

pliants had a legal claim to compensation, the amount of which claim must be ascertained in accordance with the directions laid down in Reg. 2B for determining prices, and that, as the tribunal referred to in the Regulations did not determine claims such as theirs, the suppliants were not debarred from seeking to have the amount of their claim ascertained in the High Court, and that having established their legal right to be paid and no agreement having been reached as to the amount to which they were entitled, they had established their right to an account at their own risk as to costs.

Note.—Reference should be made to the remarks of Lord *Atkinson* on this point in *Central Control Board* v. *Cannon Brewery Co.*, 35 T. L. R. at p. 554; [1919] A. C. at p. 752, where he said that the rule is 'That an intention to take away the property of the subject without giving him a legal right to compensation for the loss of it, is not to be imputed to the Legislature, unless that intention is expressed in unequivocal language.' See also *Newcastle Breweries, Lim.* v. *The King* [1920] 1 K. B. 854, and comments thereon of Lord *Dunedin* in *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.* [1920] A. C. 508, and *Hudson's Bay Co.* v. *Maclay*, 36 T. L. R. 469.

PETITIONERS ENTITLED UNDER A GRANT.

Lord Mayor, etc., of Dublin *v.* **The King.**

[1911] 1 *Ir. R.* 83.

Case.] This was a petition of right by the Lord Mayor, Aldermen and Burgesses of the City of Dublin asking for a declaration that they were entitled to be paid 3,059*l.* out of a specific part of the Local Taxation (Ireland) Account. This sum represented the suppliants' proportion of the grant-in-aid, which, as they submitted, should have been paid to them under sec. 58 of the Local Government (Ireland) Act, 1898, for the cost of maintenance of pauper lunatics in the Richmond Lunatic Asylum during the first quarter of the year 1899.

Judgment.—Barton, J., held that the Act imposed on the Lord Lieutenant the obligation, out of moneys granted from the Consolidated Fund to the Local Taxation (Ireland) Account, to cause certain sums, or a rateable proportion thereof, to be annually paid to each county council. He found that the proper moneys of the suppliants were withheld by the Crown under a mistake of fact, and remained in the hands of the Crown. Following the view expressed in *Kildare County Council* v. *The King* [1909] 2 Ir. R. 199, he held that a petition of right lies in case of grants made by or on behalf of the Crown and none the less when the grant is with the assent of Parliament. This decision was affirmed by the Court of Appeal.

MONEY PAID AS DUTY.

Campbell *v.* **Hall.** 15 *Geo. III.*, 1774.

Lofft, 655; 1 *Cowp.* 204; 20 *St. Tr.* 239—354, *and* 1387.

Case.] This was an action against the collector of customs in the island of Grenada to recover money paid as duty upon exports, on the ground that the duty had been illegally imposed.

It appeared that Grenada had been conquered from the French in February, 1762. By a Proclamation in October, 1763, the Crown had delegated to the Governor power to legislate with the advice and consent of a Council and an Assembly of Representatives. In July, 1764, letters patent were issued under the Great Seal, imposing a duty upon exports from Grenada.

The question was, whether the Crown, after the Proclamation of 1763, could still impose a new duty, and this was argued three times upon a special verdict before Lord *Mansfield*, C. J., who gave judgment for the plaintiff.

Held:—That the Crown, having once delegated the power of legislation (including taxation) to a local assembly, cannot afterwards exercise the power of levying taxes there.

In the course of his judgment Lord *Mansfield* affirmed the following amongst other propositions:—That a country conquered by the British arms becomes a dominion of the Sovereign in right of his Crown, and therefore necessarily subject to the legislative power of the British Parliament; that the conquered inhabitants when once received into the conqueror's protection become British subjects and are no longer enemies or aliens; that the laws of a conquered country continue until they are altered by the conqueror; that, conceding that the Sovereign has power without the concurrence of Par-

liament to make new laws for a conquered country, although this is a power subordinate to his power of legislation in Parliament, he can make no laws which are contrary to fundamental principles, as *e.g.* giving exemptions from the authority of Parliament, or privileges exclusive of his other subjects.

Note.—In *Sprigg* v. *Sigcau* [1897] App. Cas. 238; 66 L. J. P. C. 44; 76 L. T. 127, after the annexation of Pondoland to Cape Colony, the Governor issued a Proclamation commanding the arrest of Sigcau, formerly an independent native chief exercising paramount authority in Pondoland. In affirming the order of the Supreme Court of the colony for the release of Sigcau, the Judicial Committee held that the Governor had no power to make 'new laws.' The Proclamation exceeded any delegated authority possessed by the Governor in two particulars: (1) It was a new and exceptional piece of legislation differing entirely from any of the laws, statutes and ordinances which he was authorized to proclaim; (2) it in substance repealed the whole of the existing law with respect to criminal proceedings in so far as Sigcau was concerned. On the other hand, in *Rex* v. *Crewe* (*Earl*), *Ex parte Sekgome* [1910] 2 K. B. 576, where the High Commissioner for South Africa caused Sekgome, chief of the Butawana tribe in the Bechuanaland Protectorate, to be arrested and detained in prison, the Court of Appeal upheld the refusal to grant a writ of *habeas corpus* on the ground that the Proclamation was issued by virtue of Orders in Council made expressly in exercise of the powers given by the Foreign Jurisdiction Act, 1890,[1] and which clothed the High Commissioner with all His Majesty's power and jurisdiction in territories outside His Majesty's dominions. The effect of the Orders in Council and the Proclamation taken together was, in respect of the Bechuanaland Protectorate, to give His Majesty absolute power, subject to the provisions of an Act of Parliament, to say from time to time what law should be applied there, just as if the territory had been the subject of absolute conquest.

[1] 53 & 54 Vict. c. 37.

CONTRACT.

Bankers' Case. 2 *W. & M.*, 1690.

1 *Freeman*, 331; *Skinn.* 601; 14 *St. Tr.* 1; *Broom, Const. L.* 225—231.

Case.] Charles II. had been accommodated with loans by bankers on the security of the public revenue, and 19 Car. 2, c. 12, made the 'orders and tallies' transferable. In 1671 payment was postponed nominally for a year, but the postponement was continued indefinitely, and many of the bankers and their customers were in consequence reduced to great distress. In 1677 the King gave them partial relief by granting them annuities out of the hereditary excise granted to the Crown in 1660, which annuities were paid till 1683. They then fell into arrear and so continued, until, at the Revolution, suits were begun to enforce payment. The procedure was by petition to the Barons of the Exchequer, asking for payment of the arrears, and the matter was then argued upon a writ of error in the Exchequer Chamber.

The question was (1) whether the grant of the King bound his successors, *i.e.* could the King alienate the revenue fixed in him and his successors; (2) whether the petitioners had adopted a proper remedy.

Held:—By a majority of the judges (1) that the King could alienate the revenues of the Crown; (2) that the petitioners had adopted a proper mode of seeking remedy.

The judgment, though reversed by Lord Keeper *Somers*, was reaffirmed by the House of Lords.

Note.—No benefit was derived from the petition of right in this case,[1] until by 12 & 13 Will. 3, c. 12, s. 15, the hereditary excise, after 26th December, 1705, was ordered to be charged with an annual sum equal to interest at 3 per cent., until redeemed by repayment of one-half of the principal sum. The total amount of the bankers' debt, as it was called, was 1,328,526*l.*

[1] Per Lord *Mansfield*, C. J., in *Macbeath* v. *Haldimand*, 1 T. R. 172.

Macbeath *v.* **Haldimand.** 26 *Geo. III.*, 1786.

1 *T. R.* 172.

Case.] The defendant, as Governor of Quebec, had entered into certain contracts with the plaintiff to be supplied with goods for the public service. Upon the ground of their being unreasonable, only a part of the plaintiff's charges had been paid by the Treasury, and he was left to his remedy for the rest.

He then brought this action for his further claim against the defendant, and the jury, under direction, found for the latter.

Upon motion for a new trial the rule was discharged by Lord *Mansfield*, C. J., *Willes*, *Ashurst*, and *Buller*, JJ.

Held:—That the defendant was not personally liable. The goods were for the use of the Crown, as the plaintiff well knew. Great inconveniences would result from considering a governor or commander as personally responsible in such cases. For no man would accept of any office of trust under Government upon such conditions.

Note.—See also *Palmer* v. *Hutchinson*, 6 App. Cas. 619; 50 L. J. P. C. 62; 45 L. T. 180, where the above case was followed. Of course it is possible in cases of this kind for the public officer, like any other agent, to make himself liable personally by an express contract that he will be so liable (as in *Graham* v. *Public Works Commissioners* [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677); but there must be distinct evidence of such a contract. Moreover the common law doctrine that an agent, who makes a contract on behalf of his principal, is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, has no application in the case of a contract made by a public officer acting as such on behalf of the Crown, *Dunn* v. *Macdonald* [1897] 1 Q. B. 555; 66 L. J. Q. B. 420; 76 L. T. 444; 45 W. R. 355.

Gidley *v.* **Lord Palmerston.** 3 *Geo. IV.*, 1822.

3 *Brodr. & B.* 275.

Case.] This was an action against the defendant, as Secretary of State for War, by the executor of a War Office clerk for arrears of retired allowance, which the defendant was authorized to pay out of moneys provided by Parliament. At the trial a verdict was found for the plaintiff subject to the opinion of the Court.

The special case was argued before *Dallas*, C. J., and the Court of Common Pleas.

Held:—'That an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment.'

Note.—With this and the previous case may be compared *O'Grady* v. *Cardwell*, 1872; 21 W. R. 340 (cp. 20 W. R. 342).

It was held in *Leaman* v. *The King* [1920] 3 K. B. 663, following *Mitchell* v. *The Queen* [1876] 1 Q. B. 121 n., 122n., that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract, and that this rule applies to private soldiers as well as to officers. Neither will a petition of right lie by a private soldier for his pay.

And where the Crown had given an undertaking to neutral shipowners who had acted upon the faith of it and the Crown withdrew the undertaking, it was held by *Rowlatt*, J. that the undertaking by the Crown was not enforceable in a Court of Law, since it was not within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future: *Rederiaktienbolaget Amphitrite* v. *The King* [1921] 3 K. B. 500.

TORT.

Lane *v.* **Cotton and Another.** 12 *Will. III.*, 1701.

1 *Salkeld*, 17; 1 *Ld. Raymond*, 646.

Case.] Sir Robert Cotton and another were appointed Postmasters-General by letters patent, with power to appoint deputies and servants. The plaintiff sued them for the loss of some exchequer bills which, by the alleged negligence of the defendants, were stolen from a letter in the post-office.

The case came before *Holt*, C. J., and three other judges. *Holt* held that the defendants were liable, but the three other judges held that it was impossible for the Postmaster-General, who had to execute this office in such distant places at home and abroad, and at all times, by so many several hands, to be able to secure everything.

Held:—That a public officer is not liable for the negligence or defaults of his subordinates.

Note.—Lord *Raymond* says (at p. 658), that the plaintiff intended to bring a writ of error, upon which the defendants paid the money, but this appears to be very doubtful.[1] This decision was followed in the case of *Whitfield* v. *Lord Le Despencer*, 1778; Cowp. 754, decided by Lord *Mansfield*, C. J., and the Court of King's Bench. And in *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. at p. 124, Lord *Wensleydale* states the well settled principle of law to be that when a person is acting as a public officer on behalf of Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself; the subordinates are the servants of the public, not of the head of the department.

If a public officer himself abuses his trust either by an act of omission or commission amounting to a positive breach of his duty, and thus causes an injury to an individual, an action may be main-

[1] See Cowp. at p. 759.

tained against him (*Henley* v. *Mayor, &c. of Lyme*, 5 Bing. at p. 107; *Robinson* v. *Gell*, 12 C. B. 191). See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which, however, only applies where the officer has acted in supposed pursuance and with a *bonâ fide* intention of discharging his duty, although in fact he may have acted illegally (see *Theobald* v. *Crichmore*, 1 B. & Ald. 227).

In the case of trespass by an inferior official acting directly under the orders of his superior, who has substantially directed the act complained of to be done, both officials may be sued. If it cannot, however, be shown that the superior directed the trespass, then the person actually committing it is alone liable (*Raleigh* v. *Goschen* [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90).

Viscount Canterbury *v.* **The Attorney-General.** 5 & 6 *Vict.*, 1842.

1 *Phillips*, 306; 12 *L. J.* (*Ch.*) 381; 7 *Jur.* 224.

Case.] This was a petition of right, in which the petitioner claimed compensation from the Crown for damage done to his property while Speaker of the House of Commons by the fire which in 1834 destroyed the House of Parliament. The fire had been caused, the petitioner alleged, by the negligence of the servants of the Crown, in burning a large quantity of the old tallies from the Exchequer, in so careless a manner as to overheat certain stoves. To the petition the Attorney-General put in a general demurrer. The argument turned on the meaning of the maxim, 'The King can do no wrong,' which, it was maintained, covered civil torts as well as criminal acts.

The other side argued that no construction could be right which should enable the King to wrong the subject without making compensation, for the prerogatives exist for the advantage of the people. It was admitted, indeed, that for the personal negligence of the Sovereign, no proceedings could have been maintained.

Lord *Lyndhurst*, C., allowed the demurrer.

Held:—That a petition of right does not lie to recover compensation from the Crown for damage due to the negligence of the servants of the Crown.

Rogers *v.* **Dutt.**

13 *Moo. P. C. C.* 209 (1860).

Case.] This was an action for damages against Rogers, superintendent of marine in the service of the East India Company, by Dutt, the owner of the steam tug *Underwriter*. Rogers was charged with wrongfully issuing an order as superintendent forbidding the officers of the Bengal pilot service to allow the *Underwriter* to take any ship in tow of which they had charge. There was no evidence of malice against Rogers.

Judgment.—In delivering the opinion of the Judicial Committee, Dr. *Lushington* held that no action lay against the appellant Rogers in his official capacity. But if the act was in itself wrongful, and injured Dutt, he must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by order of the superior power. 'The civil irresponsibility of the supreme power for tortuous acts could not be maintained with any show of justice if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration.'

Note.—Thus actions of trespass will not lie against officials of the Crown or a department of the Government when sued in their official capacity or as an official body, but will lie against officials in respect of acts done or directed by them, if sued individually, even though the acts are done by the express authority of the Government.

Tobin *v.* **The Queen.** 27 *&* 28 *Vict.*, 1864.

33 *L. J.* (*C. P.*) 199; 16 *C. B. N. S.* 310; 19 *L. T.* 762.

Case.] The captain of one of Her Majesty's ships had taken and destroyed an innocent vessel, assumed by him engaged in the slave trade. The owners brought a petition of right against the Crown to recover damages. The Attorney-

General demurred on the ground that the petition of right did not show that the Crown was in law responsible for any of the alleged unlawful acts of Captain Douglas.

Judgment.—'The maxim that the King can do no wrong,' said *Erle*, C. J., 'is true, in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally, the law presumes will not be wrong. That which the Sovereign does by command to his servants cannot be wrong in the Sovereign, because, if the command is unlawful, it is in law no command and the servant is responsbile for the unlawful act; the same as if there had been no command. . . . This maxim has been constantly recognized, and the notion of making the King responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign.'

Held:—(1) That in seizing the ship Captain Douglas was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by an Act of Parliament, *viz.* the Act for the Suppression of the Slave Trade. (2) That even assuming that he was an agent employed by the Queen to seize vessels engaged in the slave trade he was not acting within the scope of his authority in seizing a ship not so engaged, and therefore could not make his principal liable. (3) That a petition of right cannot be maintained against the Crown to recover damages for a trespass.

Note.—The words of the judgment show that an action might lie against Captain Douglas, as having exceeded his authority. Comp. *Madrazo* v. *Willes*; *Buron* v. *Denman*, p. 132, and the note on the 'Liability of Officers' (p. 139.) The judgment in this case was approved by the Court of Queen's Bench, in *Feather* v. *The Queen*,[1] 1865, where it was held that a petition of right does not lie to recover damages for an infringement of patent rights by the Crown. In *Thomas* v. *The Queen*,[2] 1874, it was decided that a petition of right

[1] 35 L. J. Q. B. 200; 12 L. T. 114; 6 B. & S. 257.
[2] L. R. 10 Q. B. 31; 44 L. J. Q. B. 9.

lies to recover unliquidated damages for the breach of a *contract* made on behalf of the Crown by a duly authorized agent.

Grant *v.* Secretary of State for India.

2 *C. P. D.* 445 (1877).

Case.] This was a claim for damages by the plaintiff for wrongful dismissal from employment in the East India Service and for libel. The defendant pleaded that the orders made and the acts done by him were made and done by him as the Executive Government on behalf of Her Majesty affecting the plaintiff in his capacity of an officer holding a commission in Her Majesty's Indian military forces.

Held:—That there was no cause of action, since the Crown, acting by the defendant, had a general power of dismissing a military officer at its will and pleasure and that the defendant could make no contract with a military officer in derogation of such powers. Publication of the dismissal in the *Gazette* was an official act under the authority of the Crown, for which the defendant could not be made responsible in an action for libel.

Bainbridge and Another *v.* Postmaster-General and Crane.

[1906] 1 *K. B.* 178.

Case.] This was an action by John Bainbridge for damages for loss of services and wages owing to the personal injuries to the other plaintiff, his daughter, and by the said daughter for personal injuries sustained by her through an accident arising out of the negligence of Crane, a subordinate officer of the Post Office, in dealing with the laying of an electric wire. The action against the Postmaster-General was in his corporate capacity under the Telegraph Act, 1863,[1] and the Electric Telegraphs Act, 1868.[2] By sec. 42 of the former Act the Tele-

[1] 26 & 27 Vict. c. 112.

[2] 31 & 32 Vict. c. 110.

graph Company was liable for all accidents, damages and injuries caused by the act or default of the company or of any person in their employment. By sec. 2 of the Act of 1868, the former Act was incorporated with it and the Postmaster-General was substituted for the company. Was the Postmaster-General liable in his official capacity for the negligence of his officer?

Judgment.—Relying upon the principles laid down in *Lane* v. *Cotton*, p. 74, and *Whitfield* v. *Lord Le Despencer*, 4 Cowp. 754, the Court found that he was only liable for his own personal default. The Postmaster-General is not like a common carrier or employer, liable for the default of his servants. The co-defendant Crane was not in the employment of the Postmaster-General. He was a subordinate officer of the Crown. The *nexus*, therefore, between the Postmaster-General and Crane was broken.

Held:—That the Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department.

Note.—See *Macgregor* v. *Lord Advocate* [1921] S. C. 847, where it was held that an action for personal injuries did not lie against the War Department to recover damages caused by a collision with a car belonging to the Department, and driven by its servant.

NOTE IV.—ON REMEDIES AGAINST THE CROWN.

The ordinary modes of action are not available against the King; this is a practical corollary from the maxim that the King can do no wrong. It has, however, been doubted whether this has always been the case, although no example of an ordinary action against the reigning Sovereign can be found.

But although a subject could not bring an action against the Crown in respect of any contract, tort or crime, he was entitled to petition the King in respect of certain rights illegally invaded by the Crown. The Petition of Right belonged to that general class of petitions which were presented to the King, the Council or Parliament during the Middle Ages, and which emerged as Ordinances, Decrees or Statutes. Some of those presented to the King asked for some grace or favour. Petitions of right belong to this last group, which again is sub-divided into two groups:—Those in which the petitioner asks for something to which he would have a legal claim against a fellow-subject, and those in which he asks for something to which he would have no legal claim, *e.g.*, a petition for some office. The procedure in a petition of right in the former was cumbrous, dilatory and consequently expensive. When the petition had been indorsed 'Let right be done,' a special commission of inquiry was appointed by the Chancery to ascertain the facts. The commission's finding was generally found to involve some question of law, which was heard on the common law side of the Court of Chancery, or sent to the Court of King's Bench.

Again, if the title of a grantee of the King was involved, it was necessary to summon such grantee to attend and plead. Sometimes it was found necessary to appoint a second commission to ascertain further and better particulars, and then to present another petition to order the case to be sent for trial. Then, too, the King might delay matters by instituting a search in the records to support his title. Further, the King had other advantages in pleading. This procedure, however, lasted till 1860, but it gave rise to other remedies against the Crown. One such arose in this way. Upon the death of a tenant, or upon the lunacy of any person, an inquest was held and the King seized the property and was said to be entitled by office found. But the King might not be entitled, and so by 34 Edw. 3, c. 14, the aggrieved party was allowed to traverse the facts found by the inquest of office. And by 36 Edw. 3, c. 13, the aggrieved party might call upon the escheator to send the inquest to Chancery to be heard, which became known as the writ of *monstrans de droit*. In the Middle Ages the law of

property covered a wider field than in modern times: the modern distinction between contract and tort had hardly arisen. With the abolition of military tenures in 1660, the old real actions fell into disuse and people turned once more to the remedy of the petition of right. But as the remedy become more and more restricted, it was correspondingly less resorted to, until by the Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, the procedure was simplified. If the petition of right be indorsed generally, it goes to the Chancery Division of the High Court, but it may be indorsed in either the Chancery or King's Bench Division, or, if it relates to naval prize, in the Probate, Divorce and Admiralty Division. Before the petition can be set down for hearing, the *fiat* of the Attorney-General must be obtained, the petition being lodged at the Home Office for this purpose. Although the grant of a *fiat* is an act of grace, the Crown or its responsible advisers cannot refuse capriciously to investigate any proper question raised in a petition of right: *Ryves* v. *Duke of Wellington*, 9 Beav. 579 (1846). But if the *fiat* is refused the proceedings cannot continue, and an action will not lie against a Minister for advising the Sovereign to refuse the *fiat*: *Irwin* v. *Grey*, 3 F. & F. 635. When the *fiat* is granted the subsequent proceedings follow the course of ordinary actions as far as possible. By sec. 7 of the Act, the Court has a discretion in deciding whether the trial shall be by a judge alone or by a judge and jury: *In re Marconi's Telegraph Co.'s Petition* [1918] 1 K. B. 193.

If the subject were injured by a *grant* by the Crown made to other parties, the remedy was formerly by a writ of *scire facias*, but it would appear from sec. 5 of the Petitions of Right Act, 1860, that any injustice so done may now be remedied under a petition of right, a copy of which is to be served on the grantees.

In cases where it has been alleged that executive officers of the Crown have failed to perform their duties and have thus occasioned damage to members of the public, attempts have not unfrequently been made to induce the High Court of Justice to enforce the performance of those duties by the issue of a writ of *mandamus*. Occasionally, no doubt, such writs have been issued, but it appears now to be well settled that, although in cases where servants of the Crown have been constituted by statute agents to do particular acts a mandamus will lie against them as individuals designated to do those acts, yet where they are acting merely as servants of the Crown, and owe no legal duty to the applicant, he cannot ask for a mandamus to compel them to do their duty to the Sovereign their employer. So in *The Queen* v. *The Lords Commissioners of the Treasury*[1] the Court refused a mandamus

[1] L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 26 L. T. 64; 20 W. R. 336; see also

to compel the defendants to pay the costs of certain prosecutions out of moneys granted and appropriated by Parliament and applicable to that purpose; *Cockburn*, C. J., in his judgment observing: 'Independently of authority, I think there is no doubt whatever that we must look upon them (*i.e.* the Lords of the Treasury) as servants of the Crown. The money is voted by Parliament as a supply to the Crown. . . . It is true that the money is appropriated to a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true that . . . it is a supply to be got at by a certain specified process, and it is true that the Crown must issue warrants or orders under the sign manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But, nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the Crown,' In such cases the remedy, if there be one at all, is by petition of right. It is not, however, unusual where a legal question arises, for the advisers of the Crown to waive the objection to the jurisdiction to grant a mandamus in order that the opinion of the Court may speedily be obtained.[2]

By sec. 37 of the Crown Suits Act, 1881, if wrong or damage independent of contract is done or suffered by or under lawful authority of the Governor on behalf of H.M. or of H.M.'s Executive Government in the colony, in, upon, or in connection with a public work, such as a railway, tramway, road, bridge, electric telegraph or other work of a like nature, used by the Government of the colony or constructed by the Government out of moneys appropriated by the General Assembly and its revenues, a petition of right lies in respect of such wrong or damage.

In *Reg.* v. *Williams*, 9 App. Cas. 418 (1884), the Executive Government possessed the control and management of a tidal harbour with authority to remove obstructions in it, and the public had a right to navigate therein subject to the harbour regulations and without payment of harbour dues, and to use the staiths and wharfs belonging to the Executive Government, for which dues were to be paid.

Here a vessel was injured by a snag which the Government had for years negligently suffered to exist.

Held:—A duty was imposed on the Executive Government to take reasonable care that vessels using the staiths in the ordinary way might do so without damage.

R v. *Secretary of State for War* [1891] 2 Q. B. at p. 334; 60 L. J. Q. B. 457; 64 L. T. 764; 40 W. R. 5.

[2] As *e.g.* in *R.* v. *Commissioners of Inland Revenue* [1891] 1 Q. B. at p. 488; 60 L. J. Q. B. 376; 64 L. T. 57; 39 W. R. 317.

ACTIONS AGAINST CORPORATIONS AND DEPARTMENTS.

In some cases Government officials or Departments of State have been invested with the attributes of a corporation, and, consequently, even where liability to be sued has not been expressly made, they may be sued in their corporate capacity, either in contract or tort, in the ordinary form, *e.g.*, the Commissioners of Works and Buildings were held liable to be sued in respect of land compulsorily purchased under the Lands Clauses Acts: *Re Wood's Estate*, 31 Ch. D. 607 (1886). In *Graham* v. *Commissioners of Public Works*, [1901] 2 K. B. 781, it was held that an action lay against H.M. Commissioners, who were incorporated by statute, for damages for breach of a contract entered into by them with the plaintiffs for the erection of a public building. *Held*, also, that they did not contract as agents of the Crown, but in their own capacity. They expressly contracted for themselves.

Phillimore, J., was of the same opinion, but preferred to put his judgment on other grounds.

'The Crown cannot be sued; thus, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for the facilitating the conduct of the business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign.'

For this purpose the Crown has with the consent of Parliament established certain officials who are to be treated as

agents of the Crown, but with a power of contracting as principals. The Secretary of State for War and the Postmaster-General are instances of this, and, apparently, the Commissioners of Woods and Forests. Also Commissioners of Works and Public Buildings for certain purposes are liable to be sued. So under the Merchant Shipping Act, the President of the Board of Trade may be sued for the tort, *e.g.*, of some official at a seaport (*Dixon* v. *Farrer*, 18 Q. B. D. 43). The Commissioners in this case are liable, but no execution could be levied, because their property is Crown property—the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament. The judgment, therefore, is only declaratory.

By 1 & 2 Geo 4, c. 93, s. 9, the principal officers and commissioners of the Navy were empowered to bring any action of ejectment or other proceedings for recovering possession of land sites, and to defend any action in respect of such lands. These powers were vested by subsequent statutes in the Commissioners of the Admiralty. The Commissioners are not a corporation, and consequently writ must be served on each: *Williams* v. *The Admiralty*, 11 C. B. 420 (1851).

Raleigh v. *Goschen*, [1898] 1 Ch. 73, was an action against Goschen and the Lords Commissioners of the Admiralty and Major E. Raban, Director-General of Naval Works, with the object of establishing against them that they were not entitled to enter upon or acquire by way of compulsory purchase certain property and claiming damages for trespass.

Held, that though the plaintiff could sue any of the defendants individually for trespasses committed or threatened by them, he could not sue them as an official body and that as the action was a claim against the defendants in their official capacity it was misconceived and would not lie.

And *Romer*, J., said the rights of the plaintiff would not of necessity be confined to an action against those actually committing the trespass, who might be very humble persons. If a trespass were committed by those persons by the order or

direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship to have unlawfully ordered some sailors to take possession of a house and they obeyed his order, he could be sued for the trespass, even though he himself remained on board his ship and did not personally enter the house.

So, too, the Trinity House being incorporated under the Merchant Shipping Act, 1854, are not servants of the Crown so as to be exempt from an action for negligence—see *Gilbert* v. *Trinity House Corporation*, 17 Q. B. D. 795 (1886), where a beacon vested in the Corporation was ordered by them to be removed. Their contractor had negligently left an iron stump sticking up under water whereby the plaintiff's ship was injured.

Held liable for the contractor's negligence.

The Board of Trade has no general power to sue and is not liable to be sued. But powers to take proceedings for various purposes have been conferred by a number of statutes, *e.g.*, in bankruptcy, shipping, and navigation.

The Board of Education may sue and be sued in the name of the Board. So, too, the Ministry of Health and the Ministry of Transport. By sec. 26 of the Ministry of Transport Act, the Minister of Transport may sue and be sued in respect of matters relating to contracts, torts or otherwise, arising out of his office. He is responsible for the acts and defaults of his officers, servants or agents, and costs may be awarded to or against the Minister. For the purpose of acquiring and holding land the Minister is a corporation sole.

By s. 10 of the Air Force (Constitution) Act, 1917 (7 & 8 Geo. 5, c. 51) it is provided that "The Air Council may sue and be sued and may for all purposes be described by that name." It was held by *Russell*, J., in *Rowland* v. *The Air Council*, 39 T. L. R. 228 (1923) that this provision does not derogate from the principle that no action will lie on a contract made on behalf of the Crown by a servant of

the Crown. The provision was couched in general terms, and the words were very different from those in sec. 26 of the Ministry of Transport Act. It could not be construed so as to include the right to proceed by writ against the Department to enforce any cause of action.

And in *Chare* v. *Hart*, 88 L. J. K. B. 833 (1919), it was held by the Divisional Court, applying the *dictum* of *Will, J.*, in *Cooper* v. *Hawkins*, [1904] 2 K. B. 164, that the Crown is not bound by a statute unless expressly named or unless it so appears by necessary implication. This applies to a servant of the Crown when acting within the scope of his authority.

In *Denning* v. *Secretary of State for India*, 37 T. L. R. 138 (1920) the plaintiff was engaged for five years certain as a civil servant of the Crown, subject to dismissal for misconduct. After three years' service he was dismissed on grounds of health. Following the decisions in *Dunn* v. *The Queen*, [1896] Q. B. 116, and *Gould* v. *Stuart*, [1896] A. C. 575, *Bailhache*, J., held that a Crown servant against whom no misconduct is alleged, is liable to dismissal at the pleasure of the Crown without notice, even if the form of agreement under which he is engaged implies that except for misconduct the engagement can be terminated only by notice.

But all Ministers and public servants can be sued and made personally liable for tortious acts committed by them in their official capacity, without proof of malice or want of probable and reasonable cause.

They are, of course, liable for criminal acts.

In *R.* v. *Hall*, [1891] 1 Q. B. 747, an overseer was indicted for unlawfully, wilfully, maliciously, knowingly and corruptly omitting from the list of voters the name of one Stanley Mockett.

It was laid down that an offender against a statute for the liberty and security of the subject or for a matter of public convenience may be sued by the party aggrieved or indicted for contempt of the statute.

LIABILITY OF GOVERNORS AND VICEROYS.

Mostyn *v.* **Fabrigas.** 15 *Geo. III.*, 1774.

Cowp. 161; 1 *Smith, L. C.* 591.

Case.] This was an action in the Common Pleas against the Governor of the island of Minorca for illegally imprisoning and banishing the plaintiff without trial, on the ground that the plaintiff was concerned in an alleged riot. The acts complained of were committed in Minorca but the declaration formally alleged that they were committed in London, where the venue was laid. The defendant pleaded 'not guilty,' and a special plea alleging that he was Governor of the island, that the plaintiff was raising a sedition and mutiny, and that in consequence thereof he caused him to be imprisoned there, which as Governor he had a right to do. The plaintiff took issue upon these pleas, and the jury found in his favour with 3,000*l.* damages.

The case was argued on error in the King's Bench, principally on the ground for the defendant, that no action would lie in England for an act committed in Minorca upon a native of that island.

Judgment.—Lord *Mansfield,* C. J.: It is impossible there could ever exist a doubt but that a subject born in Minorca has as good a right to appeal to the King's Courts of Justice as one who is born within the sound of Bow bell. To repel the jurisdiction of the King's Court you must show another jurisdiction; but here no other is even suggested. The effect or extent of the King's letters patent which gave the Governor his authority can only be tried in the King's Courts, so that

a Governor must be tried in England, to see whether he has exercised the authority delegated to him legally and properly.

An action lies against a Governor in the Courts of this country for injuries committed by him in the possession of which he is Governor.

Note.—It was also argued for the defendant that no action would lie against him as Governor acting in a judicial capacity. To this Lord *Mansfield* assented, but pointed out that it had not been pleaded, nor was it even in evidence, that the defendant sat as judge of a court of justice. It may be noted that Minorca was a British possession from 1763 to 1782.

Hill *v.* Bigge. 5 *Vict.*, 1841.

3 *Moo. P. C. C.* 465; *Broom, Const. L.* 622—655.

Case.] An action had been brought against the Governor of the island of Trinidad, Sir George Hill, in the Court of Civil Jurisdiction there, for a debt incurred in England to English creditors, and before his appointment as Governor. He appeared under protest, and pleaded that he could not be sued in the Court of a colony of which he was the Governor. The plea was overruled, and the case decided against him.

He now appealed to the Privy Council, and it was argued that he, being by the terms of his commission vested with legislative as well as executive power, was not within the jurisdiction of the Courts in the colony he governed.

In the judgment (delivered by Lord *Brougham*) the judgment of the colonial Court was affirmed, and it was pointed out that (1) the authority of a Governor is only delegated from the Sovereign, and is strictly limited by the terms of his commission; (2) the Crown itself may be sued, though in a particular manner; (3) the Judges of the Courts in this country are liable to be sued in their own Courts.

Held:—That an action will lie against the Governor in the Court of his colony.

Phillips *v.* **Eyre.** 30 *&* 31 *Vict.*, 1867.

L. R. 4 *Q. B.* 225; 6 *Q. B.* 1; 40 *L. J. Q. B.* 28; 22 *L. T.* 869; 10 *B. & S.* 1004.

Case.] This was an action of assault and imprisonment against the defendant, who was Governor of Jamaica, and upon the outbreak of a rebellion there had proclaimed martial law, and taken various measures for the suppression of the rebellion, in the course of which the acts were committed for which the action was now brought.

The defendant in one of his pleas alleged that the grievances complained of were covered by an Act of Indemnity which had been passed in 1866 by the Jamaica Legislature, and that the action therefore could not be maintained.

To this the plaintiff replied that the defendant was still Governor at the passing of the Act of Indemnity, which could, therefore, only have become law by his consent. It was also urged in argument that an Act of the Jamaica Legislature could not bar the plaintiff's right to maintain an action in England.

The defendant demurred, and the demurrer was heard in the Queen's Bench, and then upon error in the Exchequer Chamber, where judgment was delivered for the defendant by *Willes*, J.

Held:—(1) That the Governor of a colony can legally give his consent to a Bill in which he is personally interested; (2) that the Act of a colonial Legislature must be treated in accordance with the principles of the comity of nations, that consequently where by the colonial law an act complained of is lawful, such act, though it would have been wrongful if committed here, cannot be made the ground of an action in an English Court, and that the same reasoning applies where an act is afterwards legalized by a colonial statute (see on this last point the judgment of *Cockburn*, C. J., in the Queen's Bench).

Musgrave *v.* **Pulido.** 43 *Vict.*, 1880.

5 *App. Cas.* 102; 49 *L. J. P. C.* 20; 41 *L. T.* 629; 28 *W. R.* 373.

Case.] This was an appeal to the Privy Council from the Supreme Court at Jamaica. The plaintiff in the action had there sued the defendant for a trespass, in seizing and detaining a schooner of which the plaintiff was charterer.

The defendant pleaded that he was Governor of the island, and entitled to the privileges of that office, and that the acts complained of were done by him as Governor and, in the exercise of his discretion, as acts of State. The Supreme Court overruled the plea, and ordered the defendant to answer further, and the defendant appealed.

It was contended for the appellant that the plea was good as a plea of privilege, and that it also disclosed a good defence to the action.

Judgment was delivered by Sir *Montague Smith* affirming the decision of the Court below, in the course of which he said: 'Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any sense acts of State.'

Held:—(1) That a Governor is not privileged from being sued in the Courts of his colony; (2) that it is within the province of municipal Courts to determine whether any act of power done by a Governor is within the limits of his authority, and therefore an act of State.

Luby *v.* **Lord Wodehouse.** 28 *Vict.*, 1865.

17 *Ir. C. L. R.* 618—640.

Case.] The plaintiff was the proprietor of the *Irish People* newspaper, and had been himself arrested, and his office had been broken into, and his working plant, books, and papers had been carried away and detained by the police. He brought an action against the Lord Lieutenant in the Irish Court of Common Pleas in trespass, trover, and detinue. The Lord Lieutenant did not appear and defend the action, but the Attorney-General applied for an order to stay all proceedings, upon the ground (*inter alia*) that the acts complained of were done by the defendant in his capacity as Lord Lieutenant of Ireland.

Held:—That no action is maintainable against the Lord Lieutenant of Ireland during his continuance in office for any act done by him in his capacity of Lord Lieutenant.

Where such an action has been brought, the Court will on motion direct the writ of summons and plaint to be taken off the file without putting the Lord Lieutenant to plead to the jurisdiction.

That the question as to whether or not the act was done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury.

NOTE V.—ON THE LIABILITY OF GOVERNORS AND VICEROYS.

It is now well settled that a colonial Governor may be sued not only in this country but in the Courts of his colony during his governorship. Some degree of doubt as to his liability was caused by an erroneous theory expressed by Lord *Mansfield* in *Mostyn* v. *Fabrigas*, 'that the governor is in the nature of a viceroy, and that therefore locally, during his government, no civil or criminal action will lie against him.' This doubt was disposed of, however, by the cases of *Hill* v. *Bigge*, and *Musgrave* v. *Pulido*, and it is now well established that a Governor's authority is expressly limited to the terms of his commission, and that he does not possess general sovereign power. There is one important qualification of his liability. He cannot be held responsible in any action for any act done by him as an *act of State* and within his legal authority. And *Musgrave* v. *Pulido* shows that it is within the province of the Courts to determine whether acts alleged to be acts of State are really so.

The Lord Lieutenant of Ireland and probably the Governor-General of India, neither of which countries was a colony, stood, indeed, upon a different footing, and were considered to be viceroys. It has been held that no proceedings in respect of an *act of State* could be even commenced against the Lord Lieutenant of Ireland, as is shown by *Luby* v. *Wodehouse*, and also by *Tandy* v. *Earl of Westmoreland*, 27 St. Tr. 1246, and *Sullivan* v. *Earl Spencer*, Ir. Rep. 6 C. L. 173. It was indeed admitted in *Luby* v. *Lord Wodehouse* (at pp. 627, 631) that actions had been brought against a Lord Lieutenant for debt in the High Courts, and that he would be liable for every personal injury or debt.

A governor, like other public officers, is not personally liable on contracts made by him in his official capacity (*ante*, p. 88), and, in all cases where his actions are of a judicial nature, he shares of course in the immunity of all judges.

The *criminal* liability of a governor is expressly provided for, at any rate in respect of misdemeanours, by 11 & 12 Will. III. c. 12, and 42 Geo. III. c. 85, which enact that all crimes committed by governors of colonies and others in the public service in places beyond seas shall

be tried in the Court of King's Bench. In *R.* v. *Eyre*,[1] it was decided that under these statutes and 11 & 12 Vict. c. 42, s. 2, in the case of a misdemeanour alleged to have been committed by an ex-governor in his colony, a magistrate within whose jurisdiction the accused had come had jurisdiction to hear the case; and if he should commit on the charge, he must return the depositions into the King's Bench, and it has since been held that the above-mentioned statutes apply only to misdemeanours and not to felonies.[2]

Ex-Governor Wall[3] was tried in 1802 for murder, on the ground of his having inflicted excessive corporal punishment in the island of Goree in 1782. He was convicted and hanged, Lord Campbell thinks, 'through vengeful enthusiasm.'[4]

In 1804 General Picton[5] was tried in the King's Bench for a misdemeanour in causing torture to be inflicted upon Luisa Calderon to compel a confession while he was Governor of Trinidad. A question arose as to whether the Spanish law permitted torture in Trinidad at the time of its cession by Spain. A rule for a new trial having been obtained, upon the second trial the jury returned a special verdict setting forth the facts, and the Court ordered the defendant's recognizances to be respited till further orders. No judgment had been pronounced when General Picton fell at Waterloo.

For an earlier discussion of the various questions as to a governor's liability, *Dutton*, app. v. *Howell*, resp. 1690, in the House of Lords may be consulted.[6]

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[1] L. R. 3 Q. B. 487.

[2] *R.* v. *Shawe*, 5 M. & S. 403.

[3] *R.* v. *Wall*, 28 St. Tr. 51.

[4] Campb., Lives of the Chief Justices, vol. 3, p. 149; Forsyth Cas. & Opin. 86.

[5] *R.* v. *Picton*, 30 St. Tr. 225.

[6] Shower, Cases in Parliament, 24. For other cases on the powers, duties, and liabilities of governors see Forsyth, pp. 80-89.

LIBERTY OF THE SUBJECT—HABEAS CORPUS.

Darnel's Case (Five Knights' Case). 3 *Car. I.*, 1627.
3 *St. Tr.* 1; *Broom, Const. L.* 158—204.

Case.] It was the forced loan of 1626 which raised the question of the power of the King to detain in confinement without cause shown, and which resulted in the Petition of Right. Amongst those arrested for refusal to pay were five knights: Darnel, Corbett, Earl, Heveningham, and Hampden, who applied to the Court of King's Bench for writs of *habeas corpus* directed to the Warden of the Fleet to show the cause of the imprisonment, that thereupon the Court might determine whether the imprisonment was legal or illegal. The writs were granted, and the Warden made a return alleging that the prisoners were in his custody by virtue of a warrant of the Privy Council, which stated that the prisoners 'were committed with no particular cause of commitment, but by special command of His Majesty.'

Counsel for the prisoners boldly contended that their imprisonment was wholly illegal. By Magna Carta no man may be imprisoned 'except by the lawful judgment of his peers or by the law of the land.' An examination by the Privy Council was not a legal trial, and if it could imprison without showing cause, prisoners might be condemned to perpetual imprisonment. This point was taken up by the Court, and Heath, Attorney-General, was directed to meet it. This, of course, he was unable to do. He only succeeded in showing that in certain cases of deep-laid conspiracies against the State, the Privy Council required time in which to prepare the case for trial. He argued from the maxim, 'The King can do no wrong,' that a cause must be presumed to exist for the

commitment, though it be not set forth. This argument was adopted by the Court.

Judgment.—The Court thereupon decided that where an *insufficient* cause of commitment was expressed, the prisoner should be delivered if the case so required, but where *no* cause was expressed the prisoner had ever been remanded. Bail was therefore refused.

Note.—Mr. Justice *Whitelocke's* explanation of the decision was that in view of the King's special command to them that there was good cause for the commitment, the Court ought to exercise its discretion by refusing bail, unless it appeared that the Crown intended to persist in refusing to show cause and thus to inflict perpetual imprisonment.

On the 2nd January, 1628, the resisters, some ninety-six in all, were released, and on the 30th Charles reluctantly summoned Parliament, which met on the 17th March. On the 21st Sir Edward Coke brought in his Bill providing that no person should be detained in prison untried for more than three months, and on the following day commenced the great debate on the liberty of the subject. The King's supporters talked about a law of State and the Divine Right of Kings, to which the popular party replied that they knew of no law save the common law, which was the law of the land. Moreover, even under the law of the Chancery, of Ecclesiastical law, of the Admiralty, of the Law Merchant, and of the Law Martial, a man might not be committed without cause expressed. After long debate, and after the Lords had tried to knock the bottom out of the petition by a proviso reserving sovereign power to the King, Charles was forced, on the 7th June, to give the usual formal assent to the Petition of Right. Thus the second great landmark in our constitutional history, whereby the arbitrary power of the King was limited, was established, and we may note that it was the work of the lawyers of the four Inns of Court.

Nevertheless, in spite of the Petition and the Habeas Corpus Act of 1640, persons continued to be illegally detained. The imprisonment of Jenks in 1676 for a speech at the Guildhall brought matters once more to a head. The justices refused to bail him on the pretence that he had been committed by a superior Court, or to try him because he had not been entered in the calendar: the Lord Chancellor refused an application for a writ of *habeas corpus* because it was vacation, and the Chief Justice made so many difficulties that Jenks lay four or five

months in prison; see 6 St. Tr. 1189. At last, after a long parliamentary struggle, the Habeas Corpus Act, 1679, was passed; see *Introduction*.

The repeal or suspension of the Habeas Corpus Acts would, as Dicey points out, deprive everyone in England of security against unlawful imprisonment, but would not deprive anyone of the right to a writ of *habeas corpus* at common law.

It must be observed that the partial or total suspension of the Habeas Corpus Acts does not free any person from civil or criminal liability for a violation of the law. It has therefore been the almost invariable practice to pass an Act of Indemnity before the expiration of the statute depriving the subject of the rights under the Habeas Corpus Acts. But such an Act has never been held to afford protection to anyone, whether a servant of the Crown or not, for acts committed by them outside the purview of the statute, *mala fide* or without probable or reasonable cause.

The constitutional practice would appear to be that Parliament may by express enactment suspend the operation of some or all of the provisions of the Habeas Corpus Acts for any period it pleases. This suspension has usually been for one year. But till the Defence of the Realm Act, 1914, Parliament had never attempted to effect such suspension by delegation to the Executive.

Rex *v.* Halliday; Ex parte Zadig.

[1917] *A. C.* 260; [1916] 1 *K. B.* 738.

Case.] The appellant Zadig was born in Germany of German parents in 1871, and became a naturalized British subject in 1905. In 1915 he was interned under an order of the Home Secretary under the provisions of Reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, issued under the Defence of the Realm Act, 1914. This regulation empowered the Home Secretary to order the internment of any person where, on the recommendation of a competent naval or military authority or of an advisory committee, it appeared to him, in order to secure the public safety or the defence of the realm, expedient in view of *the hostile origin or associations* of such person. If such person was not a subject of a State at war with His Majesty, any appeal against

the order was to be considered by an advisory committee to be presided over by a person who held or had held high judicial office. Zadig contended that the regulation was *ultra vires*.

Judgment.—It was held by the majority of the House of Lords that under the power conferred by the Defence of the Realm (Consolidation) Act upon the King in Council during the continuance of the war 'to issue regulations for securing the public safety and the defence of the realm,' that the Order made in accordance with Reg. 14B, was valid. The measure, said Lord *Finlay*, L. C., was not punitive, it was precautionary. It had been contended by the appellant that (1) some limitation must be put upon the general words of the statute; (2) that there was no provision for imprisonment without trial; (3) that the provisions made by the Defence of the Realm Act for the trial of British subjects by a civil Court with a jury strengthened the contention of the appellant; (4) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the Constitution; (5) that the statute was in its nature penal and must be strictly construed; and (6) that a construction said to be repugnant to the constitutional traditions of this country could not be adopted. Further, although the operation of the Habeas Corpus Acts had been suspended on several occasions, no general power had ever been given to the Executive to imprison on suspicion. He, Lord *Finlay*, was unable to accede to any of those arguments. It may be necessary in time of great public danger to entrust great powers to His Majesty in Council, and Parliament may do so feeling certain that such power will be reasonably exercised. The object of the regulations was for preventive purposes. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. That appeared to him to be the meaning of the statute. It was urged that if the Legislature had intended to interfere with

personal liberty, it would, as on previous occasions, have provided for suspension of the rights of the subjects under the Habeas Corpus Acts. But the Legislature selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted in previous wars. The application of the appellant had been rejected by the Divisional Court and by the Court of Appeal, and in his opinion the appeal ought to be dismissed. Lord *Dunedin*, Lord *Atkinson*, and Lord *Wrenbury* delivered judgments to the same effect, but Lord *Shaw*, in an elaborate and closely reasoned judgment, strongly dissented. His judgment deserves careful examination.

Lord *Shaw* considered the question to be one of first-class importance, the judgment appealed from to be erroneous in law and constituting a suspension and breach of those fundamental constitutional rights which are protective of British liberty. He was clearly of opinion that Reg. 14B was *ultra vires*. Parliament never sanctioned, either in intention or by reason of the statutory words employed in the Defence of the Realm Act, such a violent exercise of arbitrary power. The regulation says that if a person in respect of whom any order is made fails to comply 'he shall be guilty of an offence against the regulations.' But the appellant has not committed any offence. No charge is made against him. If he had violated the regulations, he would have had his right to trial, but his case is hopeless, for he has been seized entirely apart from any offence or from anything that he has said or done or attempted. The Secretary of State's fiat has gone forth. It is one of proscription. And there is not in the statute a word about 'hostile origin or associations,' nor, indeed, about internments. It is not too much to say that so far as Parliament was concerned its intentions were directed anxiously to providing for the prompt and correct treatment according to law of the case of offenders against the regulations. Provision is carefully made by the statute for trial. An offence may, instead of being tried by court-martial, be tried

by a civil Court with a jury. The offender must be informed of the nature of the charge, but if he is interned under Reg. 14B there is no charge: he cannot choose the form of trial; his rights are gone without trial. A 'regulation' has gone forth against him. He has been 'regulated' out of his liberty and out of every protection. The intention of Parliament was to give power to the Government to issue regulations —within the sphere and purpose of public safety and defence— prescribing a line of duty and course of action for the citizens so as to bring their private conduct into co-operation for that general end. This is what 'regulation' means: it constitutes a code of conduct; in following the code the citizen will be safe; in violating it the citizen will become an offender and may be charged and tried summarily, or by a court-martial or a jury and as for a felony. This squares with all the rest of the legislation and destroys none of it. It sacrifices no constitutional principle; it introduces nothing of the nature of arbitrary condemnation or punishment; the Acts become a help and guide as well as a warning to the lieges. The form of using the Privy Council as the executive channel for the statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself is simply the Government of the day. The author of the power is Parliament; the weilder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires*. In so far as the mandate has been exceeded there lurk the elements of a transition to arbitrary government and therein grave constitutional and public danger.

Under this regulation the Government becomes a Committee of Public Safety. But its powers as such are far more arbitrary than those of the most famous Committee of Public Safety known to history. But the principle, so called, of prevention avoids the odium of the brutality of the Terror. The analogy is with a practice more silent, more sinister and with the *lettres de cachet* of Louis Quatorze. No trial: proscrip-

tion. The victim may be 'regulated' not in his course of conduct or action, not as to what he should do or avoid doing. He may be regulated to prison or the scaffold. If Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for safety and defence. After referring to the provisions of Magna Carta, *Darnel's Case*, *Sprigg* v. *Sigeau* and the Scottish Act of 1701, Lord *Shaw* declared the regulation to be *ultra vires*.

Note.—By the legal profession generally Lord *Shaw's* judgment was regarded as the more correct exposition of the law. Whether correct or not, it must be remembered that the Government was in a very difficult position. A person might, in the opinion of the competent authority, be a danger to the State, and yet there might be no evidence sufficient to satisfy a jury. Of the hundred or so persons interned under Reg. 14B. the majority were naturalized British subjects. Very few were of British origin. Of those born in the United Kingdom nearly all were of German or Austrian origin. One was of uncertain origin.

But there is no doubt that many of the Regulations issued under the Defence of the Realm Acts were wholly illegal, and the Courts, by so declaring them, enhanced their reputation for impartiality and courage in withstanding the arbitrary actions of the Executive. As was said at the time, what Dicey calls the essential characteristic of the British Constitution—viz. 'the absence of arbitrary power on the part of the Crown, of the Executive, and of every other authority in England'—went by the board, and the long-unused prerogative of Charles I. and Strafford came to life with renewed vigour. For government by Parliament was substituted government by a small inner Cabinet, issuing its commands to Departments and to competent military authorities. To understand the situation created some account of the Defence of the Realm Acts, known as 'Dora,' must be attempted.

By the Defence of the Realm Act, No. 1, 8th August, 1914, as amended by No. 2, 28th August, 1914, 'His Majesty in Council has power to issue regulations as to the powers and duties of the Admiralty and Army Council, and of members of H.M. Forces and other persons acting in His behalf, for securing the public safety and the defence of the realm; and may by such regulations authorise the trial by courts-martial and punishment of persons contravening any of the provisions of such regulations designed—

'(a) to prevent persons communicating with the enemy or obtaining

information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's Forces or to assist the enemy or to prevent the spread of reports likely to cause disaffection or alarm; or

(b) to secure the safety of any means of communication or of railways, docks or harbours; or of any area which may be proclaimed by the Admiralty or Army Council which it is necessary to safeguard in the interests of the training or concentration of His Majesty's Forces;

(c) and may by such regulations also provide for the suspension of any restrictions on the acquisition of land or user of land or the exercise of the power of making by-laws or any other power under the Defence Acts, 1842 to 1875, or the Military Land Acts, 1891 to 1903;

in like manner as if such persons were subject to military law and had on active service committed an offence under section five of the Army Act.'

It may be observed, first, that the Act is in form merely declaratory. The Act says, 'His Majesty in Council has power to issue regulations as to the powers and duties of the Admiralty,' &c. This must mean regulations as to the existing powers and duties. It does not create new powers. Consequently regulations, for example, giving the competent authority power to arrest without warrant, to destroy private property except in case of actual danger, to enter upon any land or buildings, were all *ultra vires*. Hence, Act No. 3 was passed on 27th November, 1914, known as The Defence of the Realm (Consolidation) Act,[1] whereby 'His Majesty in Council has power . . . to issue regulations for securing the public safety and the defence of the realm and as to the powers and duties for that purpose of the Admiralty, &c.; and may by such regulations authorise the trial by courts-martial or in the case of minor offences by courts of summary jurisdiction and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—.'

Then follow the provisions of the former Acts, with some additions and with the proviso of the death penalty where the offence is committed with the intention of assisting the enemy. The effect, therefore, was to give to the Executive a general power to make regulations for the public safety and the defence of the realm, and to subject all offenders against them to military law. Against this infringement of the liberty of the subject a stand was made in the House of Lords by

[1] 5 Geo. 5, c. 8.

Lords Halsbury, Haldane, Bryce, Loreburn and Parmoor, and Act No. 4 was passed on the 16th March, 1915.[2] By this statute the right of a British subject charged with an offence against the Regulations to be tried by a civil Court with a jury was restored. 'British subject' for this purpose included a woman who before her marriage with an alien was a British subject. The person charged was entitled within six clear days from the time when the general nature of the charge was communicated to him to exercise this right, and such communication was to be in writing and notice of the same to be given at the same time. But in the event of invasion or other special military emergency arising out of the war, the operation of these provisions might be suspended by proclamation. They were in fact suspended in Ireland by the Proclamation of the 26th April, 1916.

By these statutes and regulations the country was to a large extent placed under a military dictatorship. For what was a competent military authority? It was any officer not below the rank of a lieutenant-commander in the Navy or of a field officer in the Army, and any person authorized by them, and, in some circumstances, any police constable. These persons were to a large extent irresponsible. There was practically no appeal from their decisions: they could act on mere suspicion. For instance, by Reg. 14, where the competent authority honestly suspected a person of being about to act in a manner prejudicial to the public safety, such person might be prohibited from living in a particular area. In *Rex* v. *Denison*, 32 T. L. R. 528, relief was refused since there was no evidence that the competent authority had acted dishonestly. And it was held by *Darling*, J., in *Ronnfeldt* v. *Phillips*, 34 T. L. R. 556; 35 T. L. R. 46, that the plaintiff must satisfy the Court that the order was made without the military officer really suspecting the plaintiff. If the military authority honestly suspected the plaintiff, it was not necessary that they should have had reasonable grounds of suspicion.

In *Michael* v. *Block*, 34 T. L. R. 438, hearsay evidence was allowed. It was held that the word 'behaviour' in Reg. 55 included all acts of which the competent authority might be credibly informed, and was not restricted to matters actually witnessed by the person giving such information. In *Sheffield Conservative and Unionist Club* v. *Brighten*, 32 T. L. R. 598 (1916), the premises of the club were taken under Reg. 2. It was held that the purpose for which they were taken, even if only indirectly necessary for the defence of the realm, came within the Regulation. It was argued that the military authorities had acted so unreasonably that they could not have acted in good faith, but

[2] Defence of the Realm (Amendment) Act, 1915 (5 Geo. 5, c. 34).

Avory, J., held that unless the Court could say that the action of the authorities was so unreasonable as to be obviously not *bonâ fide*, their opinion must be conclusive.

Chester, Appellant, *v.* Bateson, Respondent.

[1920] 1 *K. B.* 829; 36 *T. L. R.* 225.

Case.] The appellant appealed by case stated by the magistrates of Ulverston, Lancashire, who had dismissed a complaint preferred by him under the Small Tenements Act, 1838, for recovery of possession of his house and the ejectment of the tenant upon the ground that he was precluded from making such a complaint by Regulation 2A (2) of the Defence of the Realm Act, 1914. By this Regulation the Minister of Munitions was empowered to take possession of any unoccupied premises for the purpose of housing workmen employed in the production, storage or transfer of war material, and if of opinion that the ejectment of the workmen so employed would be prejudicial, to make an order declaring the area a special area. And 'whilst the order remains in force no person shall without the consent of the Minister of Munitions take or cause to be taken any proceedings for the purpose of obtaining an order or decree for the recovery of possession of or for the ejectment of a tenant of any dwelling-house or other premises situate in the special area, being a house or premises in which any workman so employed is living. . . If any person acts in contravention of this Regulation he shall be guilty of a summary offence.'

Judgment.—In remitting the case to the magistrates for reconsideration, the Court was unanimous in declaring that the provision requiring the consent of the Minister to proceedings was *ultra vires*. 'It might have been competent under the words of the statute,' said *Sankey*, J., 'although I express no opinion on the point, to make regulations constituting the consent of the Minister of Munitions in a proper case to the making of an order for the recovery of possession of, or for

the ejectment of a tenant of any dwelling-house or other premises of the character referred to. It was not, however, competent for His Majesty in Council to make a regulation enacting that a man who seeks the assistance of the King's Courts should be exposed to fine and imprisonment for having done so. It would have been astonishing if Parliament had conferred such a power. See what would have happened in a doubtful case. A man believing in all good faith that he was entitled to bring proceedings finds he is wrong on the evidence, but the mere fact of his having brought them is to make him guilty of an offence and liable to fine and imprisonment. I am of opinion that the regulation so made is beyond that power conferred by the Act of Parliament. I should be slow to hold that Parliament conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act.'

Note.—Darling, J., referred with approval to the judgment of *Scrutton*, J., in *In re Boaler* [1915] 1 K. B., at p. 36, where he said: 'One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges a civil wrong has been done to him or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused, and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.' And *Sankey*, J., referred to the same judgment, at p. 41, when the learned judge, finding that the words used in the Act were capable of two meanings, a wide and a narrow one, chose the latter, declining to make the more serious interference with the liberty of the subject unless the Legislature uses language clear enough to convince him that such was its intention.

It should be noted that the decision of the House of Lords in *Rex* v. *Halliday* was followed and approved by the Divisional Court in *Ernest* v. *Commissioners of Metropolitan Police*, 89 L. J. K. B. 42 (1920).

VILLEINAGE.

Pigg *v.* **Caley.** 15 *Ja. I.*, 1617.

Noy, Reports, 27.

Case.] The plaintiff brought an action of trespass against Caley for taking his horse.

The defendant pleaded that he was seised of a manor to which the plaintiff was a villein regardant, and that defendant and all those seised of the manor had been seised of the plaintiff and his ancestors.

The plaintiff replied that he was free, and the issue was found for him.

Note.—This case of *Pigg* v. *Caley* is interesting as the last instance in which an assertion of villeinage was made in an English Court of law.

Crouch's Case in 9 & 10 Eliz.[1] is usually said to be the last, but, as is pointed out in Mr. *Hargrave's* argument in the case of *Sommersett*, there are four later instances to be found in print, in 18 Eliz., 1 Ja. I., 8 Ja. I., and *Pigg* v. *Caley*.

In the case of Crouch, Butler entered into certain lands of W. Crouch as into lands purchased by his villein, and made a lease of them to his servant Fleyer, who entered, and was ejected by Crouch. Upon an action for this ejectment Crouch pleaded not guilty, and the verdict upon the issue passed for him against the plaintiff.

In another action of *Fleyer* v. *Crouch* it was alleged 'that Butler and his ancestor, and all those whose estate he hath, have been seised of Crouch and his ancestors as of villeins regardant from time whereof memory, &c.' After a trial of the issue and a special verdict it was found 'that the ancestors of Butler were seised during all that time of the ancestors of Crouch, as of villeins regardant, &c., until the first year of Henry VII., and that Crouch was a villein regardant to the said manor, and that no other seisin of Crouch or his ancestors was had since, but whether the said seisin of the manor aforesaid be in law

[1] Dyer, 266, pl. 11 (*Butler* v. *Crouch*); 283, pl. 32 (*Fleyer* v. *Crouch*).

a seisin of the aforesaid Crouch and his ancestors from the aforesaid first year of Henry VII., they pray the advice and discretion of the court, &c. . . . and afterwards it was resolved by all the Justices of the Bench that the plaintiff shall not recover upon this verdict, and that the prescription had failed since the 1st Henry VII.'

Many causes tended to the gradual decay and extinction of villeinage in England, such as the development of the towns, repeated manumissions encouraged as they were by the Church, the wars carried on against France, the growing expensiveness of serf labour, and the discontent of the peasants themselves, as testified in various risings. But the cause with which we are here most specially concerned was the discouragement of villeinage by the Courts of justice. They always presumed *in favorem libertatis*, and threw the whole burden of proof upon the lord, not only in the writ *De nativo habendo*, where he was plaintiff, but also in the writ *De homine replegiando*, where the villein was plaintiff. And nonsuit of the lord in a *De nativo habendo* was a bar to another such writ, and a perpetual enfranchisement; but a nonsuit of the villein in a *De libertate probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind.

Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord which legal refinement could strain into an acknowledgment of the villein's liberty.[1]

In Scotland in the year 1775, as appears from the preamble of 15 Geo. III. c. 28, there were many colliers, coal-bearers, and salters who were then in a state of slavery or bondage, bound to the collieries and salt-works where they worked for life and transferable with such works when their masters had no further use for them. This form of bondage was finally put an end to in 1799 by 39 Geo. III. c. 56.

A contract of service for the term of the servant's life is not illegal (*Wallis* v. *Day*, 2 M. & W. 273), though it has been said (*ibid.*) that such a contract should be under seal. But specific performance of a covenant for personal service will not be ordered.

[1] 20 St. Tr. 35-47.

SLAVERY.

Shanley *v.* **Harvey.** 2 *Geo. III.*, 1762.

2 *Eden*, 126.

Case.] A lady, the owner of a negro servant called Harvey, had made a *donatio mortis causâ* to him. Her administrator filed a bill against the negro and his trustees, claiming the gift as part of the deceased's estate.

The bill was dismissed with costs by *Northington*, C.

Held:—As soon as a man sets foot on English ground he is free. A negro may maintain an action against his master for ill-usage, and may have a *habeas corpus* if restrained of his liberty.

Note.—The subject of *Slavery* is perhaps strictly not a question of Constitutional Law; since personal liberty in this sense is one of those primary general rights, maintainable not against the Government as such, but against all the world. Yet in deference to ordinary usage the chief cases connected with the doctrine of slavery in England are here included.

The case above is given as an earlier assertion of the English doctrine than Lord *Mansfield's* famous judgment in *Sommersett* v. *Stewart*, although the question is here less directly before the Court. The latter decision, while affirming the doctrine expressed by Lord *Northington*, was only extorted from Lord *Mansfield* after he had delayed judgment for three terms, and had vainly struggled to induce the parties to a compromise.

It is noticeable that only in 1729 Mr., afterwards Lord, *Talbot*, A.-G., and Mr. *Yorke*, afterwards Lord *Hardwicke*, S.-G., had given an opinion 'that a slave coming from the West Indies to Great Britain doth not become free,' and pledged themselves to the London Merchants to save them harmless in such matters.[1] And in *Smith* v. *Brown* and *Smith* v. *Gould* (1706), 2 Salk. 666, the judges apparently considered

[1] Per Lord *Stowell* in *The Slave Grace's Case*, 2 Hagg., at p. 104.

that if the claim were properly formulated in the pleadings a right of property in a negro would be recognized by the Court. The question was doubtless one of difficulty inasmuch as the former legal status of villeinage was indisputable and had never been abolished, and by several English statutes the legal existence of slavery in the Colonies had been fully recognized.

Sommersett's Case. 12 *Geo. III.*, 1771—2.

Lofft, 1—19; 20 *St. Tr.* 1—82; *Broom, Const. L.* 59—114.

Case.] Sommersett, a Virginian slave, having been brought to England by his master, left his service and refused to return. His master seized him and committed him to the custody of a ship captain for the purpose of sending him to Jamaica to be sold as a slave. The captain was ordered by writ of *habeas corpus* to return the body of James Sommersett with cause of detainer into the King's Bench. The captain's return to the writ set forth the above facts.

Sommersett's cause was argued by Mr. Hargrave:

1. The only kind of slavery recognized by English law is Villeinage, and the last instance of that in the Courts was 15 James I. (*Pigg* v. *Caley*, p. 105, *supra*). Even here the judges had always presumed in favour of liberty, and the law recognized no villein save by prescription or the villein's confession. 2. The fact that no new form of slavery has since arisen affords a presumption that the law will admit none.

Judgment.—Lord *Mansfield*, C. J., delivered judgment that the return was insufficient. 'The state of slavery . . . is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England and therefore the black must be discharged.'

Held:—That slaves coming into England cannot be sent out of the country by any process to be there executed, but if

forcibly detained here are entitled to be discharged by writ of *habeas corpus*.

Note.—All this case expressly decided was, that a slave coming here cannot be sent out of the country against his will. In *Knight* v. *Wedderburn*, 1778, a Scotch case decided a few years later, *Somersett's Case* was relied on, and its principle extended, to declare that the slave was not bound to serve his master here (v. 20 St. Tr. 1 n.). The 'inconvenience' mentioned in Lord *Mansfield's* judgment was that (as was alleged in the argument) there were then about 15,000 negro slaves in the kingdom, who would all be affected by the judgment.

Forbes *v.* **Cochrane (and Cockburn).** *55 Geo. III.*, 1815.

2 B. & C. 448.

Case.] The plaintiff was a British merchant domiciled in Spanish Florida, and held there, as it was lawful to do, a number of slaves. Thirty-eight of these deserted one night, and were found next day upon a British ship of war lying within a mile of the shore. The commander declined to compel them to return, and an action was therefore brought by the plaintiff against him and against his commander-in-chief, who had endorsed his conduct.

A jury found for the plaintiff subject to a special case which was argued before *Bayley, Holroyd,* and *Best,* JJ., and decided for the defendants.

Judgment.—In an English ship, which may for this purpose be considered as a 'floating island,' these slaves were subject only to English law—and by that they were not slaves. The defendants did all they were legally bound to do to assist the plaintiff, perhaps more; they permitted him to endeavour to *persuade* the slaves to return. They were not bound to *force* them to return.

Held, therefore, that no action will lie against an officer who receives slaves into a British vessel and refuses to give them up.

Note.—Mr. Justice Stephen says (2 Hist. Crim. Law, 55) that the judgment in this case proceeded on the ground that the ship was not in Spanish waters at the time, and that would appear from the judgment of *Best*, J., at p. 467 of the report. But Mr. Justice Stephen expresses an opinion that commanding officers of British ships of war *in foreign territorial waters* are under an obligation imposed by international law to deliver up fugitive slaves when required to do so by the local authorities in accordance with the local law, and that it is doubtful whether by refusing to discharge that obligation they might not incur a personal responsibility to the owners of the slaves.

Case of the Slave Grace (The King *v.* Allan).

8 *Geo. IV.*, 1827.

2 *Hagg. Adm. R.* 94—134.

Case.] Mrs. Allan, of Antigua, had brought a female slave to England in 1822, and the next year returned, taking the slave with her to Antigua. In 1825 the slave was seized by the Custom House at Antigua as forfeited to the King, on suggestion of having been illegally imported in 1823. The case was decided in favour of Mrs. Allan in Antigua, and an appeal was brought by the Crown to the Admiralty Court in England.

Judgment.—Per Lord *Stowell.* This question turns really upon the count that the slave Grace, 'being a free subject of his Majesty, was unlawfully imported as a slave from Great Britain into Antigua.'

Held:—That the slave having accompanied her mistress into England, and there taken no step to establish her freedom, upon returning voluntarily to a country where slavery was legal, reverted to the condition of a slave; and her stay in England had only put her liberty, as it were, into a sort of parenthesis.

ALIENS.

In re Castioni. [1891] 1 *Q. B.* 149.

Case.] A number of the citizens of one of the Cantons of the Swiss Republic (Ticino) being dissatisfied with the administration of the Government of the Canton rose against the Government, arrested several members thereof, seized the arsenal, from which they provided themselves with arms; attacked, broke open and took forcible possession of the municipal palace, disarmed the gendarmes, imprisoned some members of the Government and established a provisional Government. On entering the palace, the prisoner, who had taken an active part in the rising, shot at and killed Rossi, a member of the Government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.

He moved for a writ of *habeas corpus*.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), 'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.'

Judgment.—The prisoner, said *Denman*, J., knowing nothing about Rossi, having no spite or ill-will against him, fired the shot thinking that it would advance the purpose of the rising. He entirely dissented, however, from the proposition that any act done in the course of a political rising or any insurrection is necessarily of a political character.

Hawkins, J., said if a man were deliberately from motives of private revenge to shoot an unoffending man, because he happened himself to be one of an insurgent crowd, no reasonable being would question that he was guilty of the crime of murder.

It was obvious to his mind, said *Stephen*, J., that the

shooting on this occasion took place in a scene of very great tumult at a moment when if a man decided to use deadly violence he had very little time to consider what was happening and to see what he ought to do, and that therefore he was committing an act greatly to be regretted. He had no doubt that the writ of *habeas corpus* ought to run, and the prisoner set at liberty.

Held:—That the offence was incidental to and formed part of political disturbances and therefore was an offence of a political character within the meaning of the statute and the prisoner could not be surrendered, but was entitled to be set at liberty.

Note.—By the Aliens Restriction Act, 1914,[1] His Majesty was empowered during a state of war to make regulations for the deportation of aliens. It was held in *Rex* v. *Knockaloe Camp Commandant, Ex parte Forman*, 34 T. L. R. 4, that there was nothing in the Act destroying the prerogative of the Crown to intern enemy aliens as prisoners of war. In *Rex* v. *Governor of Brixton Prison, Ex parte Sarno*, 115 L. T. 608 (1916), an order for the deportation of Sarno was made by the Home Secretary under Reg. 12 of the Aliens Restriction (Consolidation) Order, 1914. The Regulation, said *Reading*, C. J., was framed in accordance with the power conferred by the statute, the whole scope of which was to give extraordinary powers to the King in Council whereby he could confer on the Secretary of State extraordinary powers for dealing with aliens. In *Rex* v. *Home Secretary, Ex parte Duke of Chateau-Thierry*, 116 L. T. 226 (1917), the Home Secretary made an order for the deportation of the Duke, a Frenchman, who had been resident in Great Britain since 1907, and who alleged that he was a political refugee and unfit for military service. The French Government claimed him for military service. It was held by the Divisional Court that the Regulation did not extend to sending an alien to a country to which he did not desire to go, but the Court of Appeal held that under Reg. 12 the Home Secretary was empowered to choose a ship and put an alien on board and compel him to leave the country. The effect might be to carry the alien to his country of origin, but there was no power to specify in the order to what country he should be sent. In *Rex* v. *Superintendent of Chiswick Police Station, Ex parte Sacksteder*, 118 L. T. 165 (1918), Sacksteder, an absentee from the French

[1] 4 & 5 Geo. 5, c. 12.

Army, asked for leave to enlist in the British Army. The request was granted, but he failed to enlist. An order was consequently made under the Regulation for his deportation. *Held*, that the order was valid and there was no reason for the Court to go behind it.

Further restrictions were imposed upon aliens, some of a temporary character only, by the Aliens Restriction (Amendment) Act, 1919.[2] By this Act an alien who attempts or does any act calculated or likely to cause sedition or disaffection among the Forces or the civil population or promotes or attempts to promote industrial unrest is liable to penal servitude or imprisonment. No alien may hold a pilot's certificate or act as master of a British merchant ship or hold any appointment in the Civil Service. Former enemy aliens may be deported, and no former enemy alien might land for three years after the passing of the Act without the permission of the Secretary of State.

In *Rex* v. *Inspector of Leman Street*; *Ex parte Yenicoff*, and *Rex* v. *Secretary of State* [1920] 3 K. B. 72, it was held that under Art. 12 (1) of the Aliens Order, 1919, the Home Secretary was not bound before making an order for the deportation of an alien on the ground that he 'deems it to be conducive to the public good' to hold an inquiry as a judicial tribunal, but that he acts as an executive officer.

In *The King* v. *Secretary of State for Home Affairs, Ex parte O'Brien*,[3] where O'Brien had been arrested and deported to the Irish Free State under an order of the Home Secretary, purporting to be made under Reg. 14B of the Regulations made by virtue of the Restoration of Order in Ireland Act, 1920,[4] it was held by the Court of Appeal that Reg. 14B was inconsistent with the Irish Free State Constitution Act, 1922,[5] and impliedly repealed by it, and consequently the order of internment was bad. The order for the issue of a writ of *habeas corpus* directed to the Home Secretary was made absolute. Upon appeal it was held by the House of Lords that no appeal to a superior Court lies from an order of a competent Court for the issue of a writ of *habeas corpus*, where the Court determines the illegality of the applicant's detention and his right to liberty, although the order does not direct his discharge.[6]

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[2] 9 & 10 Geo. 5, c. 92.
[3] [1923] 2 K. B. 361.
[4] 10 & 11 Geo. 5, c. 31.
[5] 13 Geo. 5, Sess. 2, c. 1.
[6] [1923] A. C. 603.

RIGHT OF IMPRESSMENT.

Rex *v.* **Broadfoot.** 15 *Geo. II.*, 1743.

Foster, 154; 18 *St. Tr.* 1323.

Case.] At the gaol delivery held at Bristol, Broadfoot was indicted for the murder of Calahan, a sailor belonging to one of his Majesty's ships. The deceased had been shot by Broadfoot while the latter was endeavouring to avoid being pressed. The men engaged in pressing were not accompanied by a commissioned officer, as required by the terms of the press-warrant.

The Recorder, Serjeant *Foster*, directed the jury that as no commissioned officer was present everything the press-gang did must be regarded as an illegal attempt upon the liberty of the person concerned, and he told them to find the prisoner guilty of manslaughter. But 'this being a case of great expectation,' he thought it proper to deliver his opinion that—

Pressing for the sea-service is legal, provided the persons impressed are proper objects of the law, and those employed in the service are armed with a proper warrant.

Note.—The practice of impressment, though now it may perhaps be considered of merely historic interest, is important in connection with constitutional doctrines, and especially the English doctrine of personal liberty. Nor is it, perhaps, altogether impossible to imagine a revival of the practice if the public necessity should so require.

Impressment of soldiers was always less used than that of sailors. The statute 16 Car. I. c. 28, after reciting that by law no subject ought to be impressed or compelled to go out of his county to serve as a soldier 'except in case of necessitie of the sudden coming in of strange enemies into the kingdom,' or unless bound by the tenure of his lands, authorized an impressment during the following year. Since then impressment for the Army has never been exercised except by statute, as was the case, for example, in 1706 (4 Anne, c. 10), in 1757 (30

Geo. II. c. 8), and in 1779 (19 Geo. III. c. 10, during the American War). Hallam[1] has overlooked this last statute, when he speaks of 1757 as the last occasion; the impressment was, however, confined to such able-bodied idle and disorderly persons who did not exercise a lawful trade or employment or have some substance sufficient for their support, and to convicted smugglers.

The Crown has, however, by immemorial right the power to compel its male subjects between, as fixed by statute, the ages of 18 and 30 to serve in the Militia for home defence only, the selection of the men bound to serve being by ballot. This is regulated by various statutes chiefly by 42 Geo. III. c. 90, 23 & 24 Vict. c. 120, and 45 & 46 Vict. c. 49. But by annual Acts of Parliament the proceedings for raising the Militia by ballot have been for many years annually suspended unless an Order in Council should be made to the contrary, and this suspension is still continued by an Expiring Laws Continuance Act.[2]

Under the reorganization of the Forces in 1907 and 1908, the Militia ceased to be raised in the United Kingdom, and its units were transferred to the Special Reserve. The existing units of the Volunteers were at the same time transferred to the newly-created Territorial Forces, into which the Yeomanry was also absorbed. During the war of 1914 it became necessary to have recourse to conscription, and the Military Service Acts, 5 & 6 Geo. V. c. 164, and 6 & 7 Geo. V. c. 15 were passed making military service with the Regular Forces obligatory upon all males between 18 and 41, with certain exceptions.

The impressment of sailors was generally regarded as a prerogative of the Crown, though its legality was questioned by some, as, *e.g.*, by Emlyn, who, writing in 1730,[3] observes that he does not know that 'the practice ever had the sanction of one judicial determination.' Foster, also, could find no decision directly in favour of the practice, though he had no doubt as to its legality. His view was afterwards affirmed by Lord *Mansfield* in *R.* v. *Tubbs*, 1776,[4] 'the power of pressing is founded upon immemorial usage;' and Lord *Kenyon* in *Ex parte Fox*, 1793,[5] 'the right of pressing is founded on the common law, and extends to all sea-faring men.'

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[1] 3 Const. Hist. 212.
[2] See Manual of Military Law, 164 *et seq.*
[3] See Preface to State Trials, p. xxviii.
[4] Cowp. 512.
[5] 5 T. R. 276.

GENERAL WARRANTS.

Leach *v.* **Money.** 6 *Geo. III.*, 1765.

3 *Burr.* 1692, 1742; 19 *St. Tr.* 1001; *Broom, Const. L.* 522—543.

Case.] This was an action of trespass by Mr. Wilkes's printer against three King's messengers for trespass and false imprisonment. The defendants justified their conduct under a warrant of Lord Halifax, a principal Secretary of State, which required the defendants to search for the authors, printers, and publishers of an alleged seditious libel entitled *The North Briton*, and to apprehend them together with their papers. The plaintiff was apprehended and released after four days, as he turned out not to be the printer. The jury found for the plaintiff—400*l.* damages.

Upon a bill of exceptions being tendered and a writ of error brought, it was argued that such warrants had been sanctioned by long custom; and that a Secretary of State, as a sentinel of the public peace, must have the power to issue them. As a conservator of the peace, he was protected by statute 7 Ja. 1, c. 5; 24 Geo. 2, c. 44.

Judgment.—Per Lord *Mansfield*, C. J.:—There is no case for these uncertain warrants; it is not fit that the judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and give definite directions to the officer as to the person to be arrested. Nor is it enough that the usage has been so. A usage, to grow into law, ought to be a general usage; this is but the usage of a particular office, contrary to the usage of all other justices. No degree of antiquity can give sanction to a usage bad in itself.

The warrant had not been pursued, for the person taken up was neither author, printer, nor publisher, and this alone was

a sufficient justification for the judgment, which was accordingly affirmed. As the justice would not be liable, the officer has no protection.

Wilkes *v.* Wood. 3 *Geo. III.*, 1763.

19 *St. Tr.* 1153; *Broom, Const. L.* 544—554.

Case.] Wood was secretary to a Secretary of State, and, with a constable and several King's Messengers, entered into Mr. Wilkes's house, broke open his locks, and seized his papers. The warrant upon which this was done merely directed the messenger 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled *The North Briton*, No. 45, and these or any of them having found, to apprehend and seize, together with their papers.' Wilkes brought an action of trespass. The action was tried before *Pratt*, C. J. [Lord Camden], and a special jury.

Judgment.—The Chief Justice in his charge to the jury pointed out that the defendant claimed a right to force persons' houses, break open escritoires and to seize papers, &c., upon a general warrant where no inventory was made of the things taken away and no offenders' names were specified in the warrant, and therefore a discretionary power was given to messengers to search wherever their suspicions might chance to fall. If such a power was vested in a Secretary of State and he could delegate this power, it certainly might affect the person and property of every man, and was totally subversive of the liberty of the subject.

Verdict for the plaintiff—damages, 1000*l.*

Entick *v.* **Carrington.** 6 *Geo. III.*, 1765.

19 *St. Tr.* 1030; *Broom, Const. L.* 555—609.

Case.] The defendant, with three other persons, King's Messengers, acting under a warrant from a Secretary of State, had forcibly entered the plaintiff's house, he being alleged to be the author of a seditious libel, and carried away his books and papers: upon which he brought an action of trespass. The jury returned a special verdict, stating that the defendant had acted upon a warrant from a Secretary of State, authorizing the arrest of the plaintiff by name and the seizure of his papers, and that it had been the custom for Secretaries of State since the Revolution to issue such warrants; they assessed the damages at 300*l.* if the defendants were liable.

This special verdict was twice argued, and judgment was delivered by Lord *Camden*, C. J., for the plaintiff.

Judgment.—A Secretary of State is the King's private secretary, but has not in consequence the authority of a magistrate. Nor has any magistrate such a power of commitment without a power to examine upon oath. No individual Privy Councillor, as such, has a right to commit. As to the power of seizing papers, that is not supported by one single citation from any law book extant, and is claimed by no other magistrate in this kingdom, not even by the Lord Chief Justice of the King's Bench.

Held:—'That the warrant to seize and carry away the party's papers, in the case of a seditious libel, is illegal and void.'

NOTE VI.—ON GENERAL WARRANTS.

The practice of issuing general warrants to arrest, in which no particular person was specified, is said to have originated with the Star Chamber. It was afterwards revived by the Licensing Act of Charles II., and authorized to be used by the Secretary of State, and the practice is supposed to have continued after the expiration of that Act in 1694. At all events, it had been frequently exercised even after the Revolution.

The illegality of such warrants was finally settled, as well as the illegality of warrants to seize papers, by the judgments in the above cases. Each of the cases given decides a different point: *Leach* v. *Money* that a general warrant to seize some *person* not named is illegal; *Wilkes* v. *Wood* decides the illegality of a warrant to seize the *papers* of a person not named; while *Entick* v. *Carrington* carries the latter point further, and establishes the illegality of a warrant to seize the papers of a person named—manifestly a sort of general warrant as regards the papers. These decisions are supported by two able judgments—of Lord *Mansfield*, in *Leach* v. *Money* in error, and of Lord *Camden* in *Entick* v. *Carrington*.

In a subsequent action, tried in 1769 before *Wilmot*, C. J., and a special jury, against Lord Halifax, the Secretary of State, who had issued the warrants in question, Wilkes recovered 4,000*l*. damages,[1] and we are told that 'the verdict was much less than the friends of the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately, for fear of being insulted.'

The House of Commons, while the Courts were thus engaged, was also debating the subject: and in 1766 passed resolutions declaring such warrants not only to be illegal, but, if executed on the person or papers of a member of the House, to be a breach of privilege. As to this declaration, it is to be observed that Lord *Mansfield*, in a speech in the House of Lords, objected to it on the ground that declarations of the law by either House of Parliament have no binding force, and are not necessarily to be adopted by the Courts.

At the same time he affirms that 'general warrants are no warrants at all, because they name no one'; with which may be compared

[1] 19 St. Tr. 1406-1415.

Wilkes's refusal to obey the warrant, as 'a ridiculous warrant against the whole English Nation.'[2]

The only warrant recognized by the law which can in any way be called a 'general' warrant is a search warrant for goods stolen, or fraudulently obtained, or unlawfully pawned, or in respect of which forgery has been committed. The origin of this kind of warrant is unknown, and Lord *Camden* in his judgment in *Entick* v. *Carrington* says that it crept into the law by imperceptible practice. The practice in issuing these search warrants is now, however, in most cases regulated by 24 & 25 Vict. c. 96, s. 150 (the Larceny Act), which provides that a justice of the peace may, upon proof by a credible witness of a reasonable cause to suspect that any person has in his possession or on his premises any property with respect to which any offence punishable under that Act shall have been committed, grant a warrant to search for such property. It is not, however, necessary (although it is usual) to specify the exact goods for which a search is to be made.[3] The place to be searched must be specified in the warrant, as a general warrant to search all suspected places would be bad.[4]

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[2] 2 May, Const. Hist. Eng., 124.

[3] *Jones* v. *German* [1896] 2 Q. B. 418; [1897] 1 Q. B. 374; 66 L. J. Q. B. 281; 75 L. T. 161; 60 J. P. 616.

[4] 5 Burn's Justice of the Peace (30th ed.), p. 1182.

MILITARY AND MARTIAL LAW.

Grant *v.* **Sir Charles Gould.** 32 *Geo. III.*, 1792.

2 *H. Bl.* 69.

Case.] This was a motion for a prohibition to prevent the execution of a sentence of a thousand lashes passed on the plaintiff by a general court-martial. The plaintiff had been charged before the court-martial with persuading two soldiers to desert in order to join the East India Company's service. He denied that he was a soldier, or liable to martial (meaning *military*) law, though he admitted that for purposes of a recruiting agent he assumed the character of a sergeant in the 74th regiment, to enable him to carry on the business of a recruiting agent, and received pay and allowances as such; or that he had been guilty of a military offence. The plaintiff having been convicted and sentenced, applied to the King's Bench for a prohibition.

Judgment.—Lord *Loughborough*, C. J., pointed out that 'martial law does not exist in England at all.' When martial law is established it is very different from what is inaccurately called martial law merely because it is the decision of a court-martial. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons; every species of offence committed by any person who appertains to the Army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. The Mutiny Act has created a Court to try those who are a part of the Army for breaches of military duty. 'Naval courts-martial, military courts-martial, Courts of Admiralty and Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time imme-

morial exercised for the purpose of preventing them from exceeding the jurisdiction given to them.'

The motion was therefore refused.

Note.—Much confusion has often arisen between the terms 'military law' and 'martial law,' and it cannot be said that Lord *Loughborough's* judgment in the above case is altogether calculated to lessen the confusion.

Military law is the law which at all times, whether in peace or war, at home or abroad, governs the soldier. Civilians are in no case subject to it, unless as members of the Reserve or Territorial Forces they are called out for actual military service or training, and, even if they are riotous or insurgent, civilians cannot be dealt with under military law but must be left to the ordinary civil Courts. Although military Courts have jurisdiction over soldiers in respect of many ordinary criminal offences as well as for breaches of discipline, the civil Courts also have jurisdiction over them as regards offences against the law of the land; and by sec. 41 of the Army Act a soldier is not to be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in the United Kingdom. Military law is to be found in the Army Act (44 & 45 Vict. c. 58), supplemented by Rules of Procedure made by Her Majesty under that Act, by the annual Army Acts, by the King's Regulations, and by Army Orders.[1]

Originally *martial* law was the law administered in the Court of the Constable and Marshal, which had jurisdiction over (1) appeals of death or murder beyond the seas; (2) prisoners of war; and (3) offences of soldiers contrary to the laws and regulations of the Army. But by the reign of James I. this jurisdiction had been almost entirely lost, and the Court itself become little more than a Court of chivalry. The seventeenth-century lawyers understood martial law to mean military law—*i.e.*, the code of military regulations necessary to maintain discipline and applicable to soldiers only and to no one else. The Stuarts attempted to impose military law upon the civil population, and it was in this sense that martial law was referred to in the Petition of Right (3 Car. I., c. 1), which declared the illegality of 'divers commissions under your Majesty's great seal by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land according to the justice of martial law against such soldiers or mariners, or other dissolute persons

[1] Full information on this subject will be found in the Manual of Military Law.

joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law,' instead of the accused persons being proceeded against in the ordinary Courts. It must be borne in mind, however, that at the date of the Petition of Right peace undoubtedly prevailed within the kingdom.

Since the Petition of Right there has been no proclamation of martial law in England, but it has been proclaimed in Ireland (in May, 1798), in the Colonies,[2] and in Ireland again during the war of 1914.

What is known as martial law must be carefully distinguished from that right which at common law the Government possesses to put down by force riots and violent resistance to the execution of the law. For the purpose of protecting persons or property against violent crime any soldier or police officer, and indeed any private person, is entitled to use force, and even, in a case of necessity, to take the life of the person offending.[3]

Although martial law in the original sense is obsolete and in the sense attributed by the Stuarts declared by the Petition of Right to be illegal, it is still used to mean the law administered by the Executive through the military authorities in time of invasion or rebellion and imposed upon the civilian population as well as upon enemy aliens or rebels. It is said to be derived from and to be based upon the King's prerogative for the maintenance of the peace. But it is really founded on necessity, and is not a peculiar attribute of the Crown. It is the right and duty, not only of the Crown or the Executive but of every subject, to assist in maintaining the peace, and any force necessary for this purpose may be used by the Crown or by anyone else, whether military or civil. 'The only principle on which the law of England tolerates martial law,' said the Law Officers of the Crown in 1838, 'is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence.'

And although it is usual for the Government upon invasion or disturbance to issue a proclamation of martial law, such proclamation has

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2 See Forsyth, Cases and Opinions on Constitutional Law, pp. 207-214; Halleck, On International Law, p. 499; Dicey, Law of the Constitution, pp. 284, 538.

3 See further on this subject, and as to the duty of soldiers in repressing riots, the Report of the Committee on the disturbances at Featherstone on September 7, 1893, and the Report of the Select Committee on the Employment of Military in Cases of Disturbances, Parl. Pap. 236 (1908).

no legal effect. It must be regarded as the statement of an existing fact rather than the creation of that fact. It differs from the Continental declaration of 'a state of siege' under which 'the constitutional guarantees are suspended.' Such suspension of the law of the land is unknown to the law of England.

The position has been clearly stated by Sir James Stephen:—

'(1) Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an invasion and the restoration of order and lawful authority.

'(2) The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly and criminally as the case may be. They are not justified in inflicting punishment after resistance is suppressed and after the ordinary Courts can be reopened. (See *Wright* v. *Fitzgerald*, 27 St. Tr. 765).

'(3) The Courts-martial, as they are called, by which martial law in this sense of the word is administered, are not, properly speaking, Courts-martial or Courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not bound to proceed in the manner pointed out by the Mutiny Act and the Articles of War. On the other hand, if they do so proceed they are not protected by them, as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and the Articles of War.'[4]

Just as these courts-martial are not real Courts, so the law administered by them is not real law. 'Martial law,' said the Duke of Wellington, 'is neither more nor less than the will of the general who commands the Army, in fact no law at all.' Thus, for any trespass to person or property the wrongdoer may be tried at once if the civil Courts are open, and, if not, as soon as they are reopened. Indemnity Acts are a recognition of the fundamental principle of English law that a subject cannot be deprived of his common-law rights except by Act of Parliament or by some well-established principle of law. In *Ex parte Marais* [1902] A. C. 109, however, it was said by Lord *Halsbury*,

[4] Hist. Crim. Law i., p. 215.

L. C., that 'where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals. . . . No doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.' This decision has been hotly contested.[5] It is not binding on English Courts, and probably not on the Privy Council itself. It has not been followed in any English Court. It was not followed by *McCardie*, J., in *Heddon* v. *Evans*, 35 T. L. R. 642 (1919), although at the date of the trial a state of war still continued. It was followed in *Rex* v. *Allen* [1921] 2 Ir. R. 241 by the Divisional Court in Ireland, where it was held that whilst war was raging it had no jurisdiction to interfere with the proceedings or sentence of a military court. This decision was also followed in *Rex* v. *Strickland* [1921] 1 Ir. R. 265, although the Chief Justice was at the time holding the Assizes in the martial-law area. But in *Egan* v. *Macready* [1921] 1 Ir. R. 265, where the facts were similar, this principle was rejected by *O'Connor*, M. R., who said: 'Military authorities, like every other authority of the State, are subject to the Supreme Court of the realm.' As the writ of *habeas corpus* had not been obeyed, he ordered a writ of attachment to issue against General Macready and two other officers concerned. By the Restoration of Order in Ireland Act, 1920, Parliament had invested courts-martial constituted under the Act with jurisdiction over the whole civil population for the trial of certain offences. In all these cases the military courts were not constituted in accordance with the provisions of the Act. 'Consequently,' said *O'Connor*, M. R., 'these courts had no legal status whatever, and the penalties awarding death sentences for the offences charged had no sanction from British law. The claim of the military authority to override legislation would seem to tend to call for a new Bill of Rights. To sweep away limitations as to punishment would be a new development of British constitutional law, for which I can find no precedent.' The same view has been maintained in the United States: see *Ex parte Milligan*, 4 Wall. 2.

The true rule would therefore appear to be that acts done by military authorities or other persons, and all proceedings and sentences of courts-martial, are examinable and may be reviewed by the civil Courts if they are open, not only when a state of war is over, but whilst it is actually raging. If the proceedings are shown to be necessary, naturally the Courts will not interfere, but it is for the Courts to determine whether they were necessary. That this is so appears from

[5] See articles by Holdsworth, Erle Richards and Dodd in xviii Law Quart. Rev., and by Pollock in xix Law Quart. Rev.; and see 34 Harvard Law Rev. 659.

the fact that Acts of Indemnity are usually passed indemnifying all person for acts done *bonâ fide*. But such Acts do not usually relieve persons from responsibility for acts committed *malâ fide*: see *Wright* v. *Fitzgerald*, 27 St. Tr. 765.[6]

During the state of civil war in Ireland following the Free State (Agreement) Act, 1922,[7] many persons who resisted the Dail or Provisional Government and were captured were tried by military courts and sentenced to death. In the case of *Rex* v. *Portobello Barracks Commanding Officer, Ex parte Erskine Childers*, 67 S. J. 128, *O'Connor*, M. R., refused an application for a writ of *habeas corpus* upon the ground that there was a state of war and the Courts were unable to function properly as in times of peace.

In *Clifford* v. *O'Sullivan* [1921] 2 A. C. 570, where the appellants had been tried and sentenced to death for being in the possession of firearms by a military court held under the authority of the Commander-in-Chief in Ireland, they applied for a writ of prohibition against the military court on the ground that the court was illegal, and had no jurisdiction to deal with the matters in question. *Powell*, J., refused the application, and the Court of Appeal in Ireland dismissed an appeal from his order upon the ground that it was an order made in a criminal cause or matter within sec. 50 of the Supreme Court of Judicature Act (Ireland), 1877. It was held by the House of Lords that the order of *Powell*, J., was not made in a criminal cause or matter within the Act, because the proceedings before the military court were in no sense criminal proceedings, and that an appeal lay from that order, and that the prohibition did not lie, first, because the officers constituting the military court did not claim to act as a judicial tribunal in any legal sense, and, secondly, because they were *functi officio*; they had long since completed their investigation, so that nothing remained to be done by them.

In this case prohibition was not the right procedure. As Lord *Sumner* pointed out, the execution of the judgment did not lie with the Court; it was not in the hands of those officers or of anyone acting under their directions. It was for the general officer commanding to decide whether the sentence of the court be carried out or not. He was not a Court and did not pretend to be one. Relief should have been sought by way of *habeas corpus*.[8]

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[6] See, generally, O'Sullivan's Military Law and the Supremacy of the Civil Courts, and Pitt Cobbett's Leading Cases on International Law ii., pp. 53-61, 4th ed. by Bellot.

[7] 12 Geo. 5, c. 4.

[8] See *The King (Johnstone)* v. *The Officer Commanding Ardaravan House Barracks*, [1923] 2 I. R. 13.

LIABILITY OF OFFICERS INTER SE.

Sutton *v.* **Johnstone.** 22 *Geo. III.*, 1786.

1 *T. R.* 493; *Broom, Const. L.* 656—735.

Case.] The plaintiff, a naval captain, brought an action against the commanding officer of his squadron for having put him under arrest and imprisonment, and so kept him nearly three years, until the plaintiff was tried by court-martial for disobedience of orders. He was acquitted, and afterwards brought this action, alleging that in imprisoning him and causing him to be brought before a court-martial the defendant had acted maliciously and without reasonable or probable cause. The action was twice tried, and on each occasion the jury gave a verdict for the plaintiff with heavy damages.

A motion was made in arrest of judgment in the Court of Exchequer, but the Court decided in favour of the plaintiff. The defendant then brought a writ of error in the Exchequer Chamber, when that Court reversed the judgment, and this reversal was affirmed on the case being carried to the House of Lords.

Held:—That this is not like an action of trespass, which supposes that something manifestly illegal has been done. Here it is for the ordering of a prosecution which upon the stating of it is manifestly legal.

The important question is whether such an action (viz. against a commander for exercising his discretion in ordering his subordinate to be tried by court-martial) can lie. Many men, when put upon their trial before a court-martial, have thought the charge to be without a probable cause, malicious and oppressive, yet there is no usage, precedent or authority in support of the action. There is a provision in the Articles of

War against such an abuse as an oppressive prosecution. A court-martial can alone judge of the original charge, and the same jurisdiction which tries the original charge must try the probable cause, which is in effect a new trial. And in this case, even if the action were maintainable in itself, judgment ought, we think, to be given for the defendant.

Note.—It will be seen that although Lord *Mansfield* expressed a strong opinion on the subject, he did not expressly decide that the action was not maintainable, as he held that there was probable cause for the imprisonment and prosecution of the plaintiff; and the reversal of the judgment of the Court of Exchequer must be taken to have proceeded on that ground.[1]

Lush, J., said, in *Dawkins* v. *Paulet*,[2] that he regarded the judgment in this case as of high authority, although the ultimate decision was based upon independent grounds; that every year since Acts have passed for the government of Army and Navy without any intimation of a contrary view on the part of the Legislature; the judgment stands unassailed, one which has received the tacit assent of the Legislature and the profession.

Dawkins *v.* Lord Rokeby. 30 *Vict.*, 1866.

4 *F. & F.* 806; *L. R.* 8 *Q. B.* 255; *L. R.* 7 *H. L.* 744.

Case.] There were *two* actions arising out of the same matter by a military officer against a superior officer.

The first was an action for false imprisonment and malicious prosecution before a court of inquiry, and conspiring with others to cause the plaintiff's removal from the Army —tried in 1866.

Judgment.—*Willes*, J., non-suited the plaintiff on the ground that no cause of action in a civil Court had been shown. The matter had been discussed and disposed of by the military authorities. Persons who enter into the military

[1] See *Warden* v. *Bailey*, 4 Taunt. 89.

[2] L. R. 5 Q. B. at p. 122; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336; *v.* also L. R. 8 Q. B. at p. 271.

state become subject to military rule and discipline, and must abide by them.

The *second* was an action for libel and slander on the ground of Lord Rokeby's evidence before the court of inquiry held as to Col. Dawkins' conduct, and was tried before *Blackburn*, J., who directed the jury that the action did not lie, on the ground that the statements complained of were made by a military officer in the course of an inquiry into military matters, even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice, and without any reasonable and probable cause.

Upon a writ of error this direction was approved by a Court of ten judges in the Exchequer Chamber—judgment being delivered by *Kelly*, C.B.

A court of inquiry is a court duly and legally constituted, and recognized in the Articles of War and in many Acts of Parliament. And the principle is clear that no action of libel or slander lies against judges, counsel, witnesses, or parties for words spoken in the ordinary course of any proceeding before any court recognized by law.

Upon appeal to the House of Lords (5th May, 1874) the opinion of the judges was taken, and the judgment *affirmed*.

Note.—In 1869 Col. Dawkins brought an action against Lord Paulet[1] for the report made in the course of his duty to the Adjutant-General, declaring the plaintiff to be unfit for command, &c. The plaintiff by replication alleged actual malice and *mala fides*. *Mellor* and *Lush*, JJ., held the replication bad; no action will lie against a military officer for an act done in the ordinary course of his duty, even if done maliciously or without reasonable cause. *Cockburn*, C. J., dissented, and held the replication good; *Sutton* v. *Johnstone* had proceeded on the ground that there was reasonable and probable cause of arrest; and in that case Lord *Mansfield* expressly said, 'there is no authority either way.' *Dawkins* v. *Rokeby* (this being of course only the earlier action of 1866) was the other way, but was a single nisi prius judgment.

Then in the *second* action against Lord Rokeby in 1873, the Court

[1] L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336.

of Exchequer Chamber, after referring to the L. C. J.'s opinion, observes[2] that 'it is satisfactory to us to feel that the general question of privilege as applied to communications between military authorities upon military subjects . . . is yet open to final consideration before a Court of the last resort.'

When the question did eventually come before the House of Lords it was settled against the view taken by *Cockburn*, C. J.

The principle that the civil Courts cannot be involved to redress grievances arising out of military duties between persons both subject to military law was clearly affirmed by *Lush*, J., in *Dawkins* v. *Lord Paulet*, and approved by the Court of Appeal in *Marks* v. *Frogley*.[3]

Cases such as *Sutton* v. *Johnstone* and *Dawkins* v. *Lord Rokeby*, where the acts complained of arose out of military duty, must be distinguished from cases where there is no colour for alleging that the grievance arose in the course of such duty. The mere fact that both the plaintiff and the defendant were in the military service of the Crown will not affect the power of a civil Court to adjudicate upon the matter in dispute.[4]

In this connection the cases of *Fraser* v. *Hamilton*, 33 T. L. R. 431 (1917) and *Fraser* v. *Balfour*, 87 L. J. K. B. 1116 (1918) should be consulted. In both the Court of Appeal held that there was no cause of action, and that even if the act complained of was malicious, this did not confer jurisdiction upon the Court. Upon appeal to the House of Lords in the latter case, Lord *Finlay*, L. C., pointed out that the cases of *Grant* v. *Gould*, *Sutton* v. *Johnstone*, *In re Mansbergh* (30 L. J. Q. B. 296), *Keighley* v. *Bell* (4 F. & F. 763), *Barwis* v. *Keppel* (2 Wilson, 314), *Dawkins* v. *Rokeby*, and *Dawkins* v. *Paulet* are all authorities to show that cases involving questions of military discipline and military duty only are cognizable only by a military tribunal, and not by a civil Court. That decision was affirmed by the House of Lords, but it did not affirm the other and wider proposition, that military wrongs arising from a malicious exercise of authority are not cognizable in a Court of law. 'That question,' said Lord *Finlay*, 'is still open, at all events in this House. It involves constitutional questions of the utmost gravity.'

In an exhaustive judgment, Mr. Justice *McCardie*, in *Heddon* v. *Evans*, 35 T. L. R. 142, reviewed the authorities, and came to the following conclusions: (1) That a military tribunal or officer will be

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[2] L. R. 8 Q. B. at p. 272.

[3] [1898] 1 Q. B. at p. 899; 67 L. J. Q. B. 605; 78 L. T. 607; 46 W. R. 548.

[4] *Warden* v. *Bailey*, Taunt. 67.

liable to an action for damages if, when acting in excess of, or without jurisdiction, they or he do or direct that to be done to another military man, whether officer or private, which amounts to assault, false imprisonment, or other common-law wrong, even though the injury inflicted purport to be done in the course of actual military discipline. (2) That if the act causing the injury to person or liberty be within the jurisdiction and in the course of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause. Applying these principles, the learned judge held that the defendant had jurisdiction to order the plaintiff into military custody, and had not exceeded his powers in causing him to be confined at Fulford Detention Barracks.

LIABILITY OF OFFICERS TO THE PUBLIC.

Madrazo *v.* **Willes.** 1 *Geo. IV.*, 1820.

3 *B. & A.* 353.

Case.] This was an action brought against the captain of a British man-of-war by a Spanish subject for the wrongful seizure on the high seas of a ship employed by him in carrying on the African slave trade, together with her cargo of 300 slaves. The plaintiff was not forbidden to carry on this trade by the laws of his own country.

At the direction of *Abbott*, C. J. [Lord *Tenterden*], the jury assessed the damages for ship and slaves separately, as the judge at first doubted whether damages could be recovered in an English Court for loss in the prosecution of a trade here declared unlawful.

Upon the argument of a rule to reduce the damages accordingly, the Court, *Abbott*, C. J., *Bayley*, *Holroyd*, and *Best*, JJ., decided in favour of the plaintiff.

Held:—That the plaintiff was entitled to recover damages for seizure of the slaves, of which he was legally possessed by the laws of his own country. It would have been otherwise if the slave trade had been forbidden by his own country, or the general law of nations.

Buron *v.* **Denman.** 11 *Vict.*, 1848.

2 *Ex.* 167.

Case.] The plaintiff, who was a Spaniard, and not a subject of the Queen, was by the law of his own country legally possessed of slaves on the west coast of Africa. The defendant was captain of a man-of-war, who had proceeded to the

Gallinas to release two British subjects there detained as slaves. He then concluded a treaty with the native king for the abolition of the slave trade in his country, and in execution of the treaty fired the plaintiff's premises and carried away and released his slaves.

The defendant's proceedings were afterwards approved by the English Government.

The case was tried at Bar before *Parke*, *Alderson*, *Rolfe*, and *Platt*, BB.

Held:—First, that the plaintiff had a property in his slaves and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations and it not appearing that Spain had passed any law abolishing the slave trade. Secondly, that the ratification of the defendant's act by Ministers of State was equivalent to a prior command. This act by adoption became the act of the Crown and consequently the seizure of the slaves and goods by the defendant was a seizure by the Crown and an act of State for which the defendant was not responsible. 'Whether the remedy against the Crown is to be pursued by a petition of right,' said *Parke*, B., 'or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his own country, to insist upon compensation from the Government of this—in either view the wrong is no longer actionable.'

The case was ultimately settled on terms.

SUPERIOR ORDERS.

Rex *v.* **Thomas.** 4 *M. & S.* 442 (1815); *Russell on Crimes*, 1, p. 774.

Case.] During time of peace, Thomas, acting as a sentinel on board H.M.S. *Achilles*, lying in the Medway, received orders from his superior officer to keep off all boats unless they contained officers in uniform or unless the officer on deck allowed them to approach. A number of boats pressed on the ship and Thomas repeatedly warned them to keep off. One, however, persisted and came close under the ship. Thomas then fired at a man in the boat and killed him. He was indicted for murder.

Judgment.—The prisoner was tried at the Kent Assizes before *Bayley*, J., at nisi prius and was found guilty, but the jury finding that the prisoner fired under the mistaken impression that it was his duty. On a case reserved the judges were unanimous that the killing was nevertheless murder; but were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up mutiny, the sentinel would have been justified. Thomas received the King's pardon.

Keighly *v.* **Bell.**

4 *F. & F.* 763 (1866).

Case.] The plaintiff, Captain Keighly, was arrested and imprisoned in India by the order of Major-General Bell under orders from the Government. The plaintiff contended that these orders had been procured by means of reports or representations of a malicious nature by the defendant or for some

sinister and improper motive and without any reasonable or probable ground.

Judgment.—In holding that there was no evidence of any such bad motive or of absence of any reasonable ground, *Willes*, J., laid down the general principle that 'a soldier acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officers—is not liable for what he does unless it be shown that the orders were such as were obviously illegal.' 'I believe,' said the learned judge, 'that the better opinion is that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders.'

Reg. *v.* Smith.

17 *C. G. H. Rep.* 561 (1900).

Case.] During the South African War, Smith formed one of a patrol which left Naapoort in November, 1899, under the command of Captain Cox for the farm Jackalsfontein in order to arrest certain occupants of the farm who were suspected of being about to join the enemy. On the approach of the patrol a messenger was seen riding off at a great pace in the direction of the enemy. The position of the patrol was therefore one of danger and time was of the utmost importance in the execution of its object. One of the occupants of the farm, having been arrested, a second bridle for his horse was required. Cox ordered Dolby, a farm servant, to fetch a bridle, being satisfied Dolby knew where it was to be found. Dolby failing to produce the bridle, Cox ordered Smith to 'drill a hole in him' if he did not produce it at once. Dolby apparently turned obstinate and did nothing. Thereupon Smith shot him. Smith was indicted of murder and the case was sent for trial before a Special Court established under the Indemnity and Special Tribunals Act, for the trial of offences committed by soldiers and civilians during the war.

Judgment.—In delivering the judgment of the Court, consisting of three civilian judges, Solomon, J., said that on the one side it has been argued that absolute, implicit and unquestioning obedience is required. This was a rule of law the Court could not adopt in the present case. A soldier is responsible by military and civil law, and it was monstrous to suppose that a soldier would be protected where the order was grossly illegal. The Court could not therefore decide that a soldier is bound to obey any order which may be given.

On the other side, it had been argued that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal. This was an extreme proposition which the Court could not accept. Under the Army Act a soldier is only responsible for disobedience if the order given him is a lawful order, but at the same time for the protection of the private soldier it goes a good deal further. Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. 'If in any doubtful cause,' continued the learned judge, 'a soldier were entitled to judge for himself, to consider the circumstances of the case and to hesitate in obeying the order given him, that would be subversive of all military discipline. One must remember, especially in time of war, that obedience to orders is required from a private soldier, and that it is not desirable that a soldier should be encouraged to question the orders given him by his superiors in cases where there is some doubt whether the order is lawful or not. It is clear that we cannot adopt as a rule either of these two extreme propositions.'

The rule laid down in the Manual of Military Law was therefore adopted, viz.: that 'if the command were obviously illegal, the inferior would be justified in questioning or even in refusing to execute it; as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. But so long as the orders of the superior are not obviously and decidedly in opposition to the law of the land or well-known and established customs of the Army, they must meet with

prompt, immediate and unhesitating obedience.' And the *obiter dictum* of Mr. Justice Willes in *Keighly* v. *Bell* to the effect that 'an officer or soldier acting under orders from his superior which are not necessarily or manifestly illegal would be justified,' was approved.

'I think,' said Mr. Justice *Solomon*, 'it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.'

Satisfied that the order given by Cox was not so plainly illegal that Smith would have been justified in refusing to obey it, the Court held that Smith was protected in carrying out the order to shoot Dolby if he did not get the bridle. Smith was accordingly found not guilty.

Note.—This decision was followed in *Kaplan* v. *Hanekem*, 20 C. G. H. Rep. 53, and *Rex* v. *Burns*, 19 C. G. H. R. 477. Just as *Danby's Case* went to establish the principle that even a Minister of the Crown cannot shelter himself by a plea of obedience to the express command of his Sovereign, so these cases show that a soldier or officer cannot plead the orders of his superior officer or of the Government to an action of trespass or to a criminal charge, if such orders were so manifestly contrary to the law of the land that he must or ought to have known that they were illegal. By the Mutiny Acts and by the Articles of War a soldier is only bound to obey *lawful* orders. The word 'lawful' is not a chance expression. Under the Military Code of 1715, 'every officer and soldier who should refuse to obey the military orders of his superior officer' was liable to the death penalty. At this period the Army was under the personal command of the Sovereign. This situation was declared by the House of Lords 'to be a violation of the fundamental laws of the realm whereby commands or orders of the Crown are bound and restrained within the compass of the law, no person being obliged to obey them if illegal, but punishable by the law should he do so.' The Mutiny Act of 1749 was accordingly amended by the addition of the word 'lawful,' and every subsequent Mutiny Act and Articles of War contain the phrase 'lawful command or order.'

The principle is the same in international law, and has recently been accepted by the signatory Powers to the Washington Treaty of 1922. It is just as fundamental in international law as in municipal law. If once repudiated it is the negation of all law.[1]

In *Clark* v. *McGrath*, *The Times*, 19th April, 1919, the plaintiff was a civil engineer employed by the Ministry of Munitions in the Mechanical Warfare Department at Oldbury. He was arrested on a charge of improperly taking photographs of tanks under construction, and was detained in custody. He sued the defendants for damages for assault, false imprisonment and slander. On the issue of slander the defendants pleaded privilege and justification, and on the issue of arrest that they acted under the general instructions of the Ministry of Munitions. *Rowlatt*, J., held that the defendants had acted wrongfully, and gave judgment for the plaintiff for 10*l.* damages with costs.

[1] Pitt Cobbett's Leading Cases on International Law, ii., pp. 176-180, 4th ed., 1924, by Bellot.

NOTE. VII.—ON THE LIABILITY OF OFFICERS—MILITARY AND NAVAL.

Some degree of protection to the persons responsible for the performance of duties imposed upon them by the Executive is necessary, to induce them to undertake the performance of those duties, and to secure their regular and uninterrupted working.

This protection must be two-fold—first against their own subordinates, and secondly against the general public.

1. No officer is responsible to strangers for any injury done to them in the regular and proper discharge of his duties, or arising out of his pursuing the lawful instructions of his superiors, or where his superiors have ratified his acts. This is illustrated by *Buron* v. *Denman* (*supra*, p. 132). In *Nicholson* v. *Mouncey*,[1] a sloop of war had run down the plaintiff's vessel, while the sloop was under the defendant's command, although at the time of the collision the ship was under the navigation of the lieutenant. The captain was held not liable, since he was not in the ordinary position of the master of a vessel, and the lieutenant was in no sense his agent or servant. An officer, however, who is actually negligent in such a case is personally responsible in damages. See, *e.g.*, *The Volcano*, 2 W. Rob. 337.

The officer's immunity will not extend so as to cover any tortious act which does not take place in pursuance of the proper discharge of the officer's general or special duty. This is shown in *Madrazo* v. *Willes*.[2] So it was suggested in *Tobin* v. *The Queen*[3] that an action might lie against Captain Douglas, who had also destroyed a supposed slaver. And in *Nireaha Tamaki* v. *Baker* ([1901] A. C. 561, 576; 70 L. J. P. C. 66; 84 L. T. 633) it was held that an aggrieved person may sue an officer of the Crown for an injunction to restrain a threatened act purporting to be done in pursuance of an Act of Parliament, but really outside the statutory authority.

2. Prompt obedience is essential to the discipline and efficiency of the Services; and superior officers must often decide hastily. They must be guarded against excessive responsibility to their inferiors. It

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[1] 15 East, 384.
[2] *Supra*, p. 132.
[3] *Supra*, p. 76.

is settled, therefore, that an officer cannot be held liable in a civil Court for any act done in the discharge of his duty, even though it be alleged to be done maliciously and without reasonable cause. For this *Sutton* v. *Johnstone* is the great authority. Though that case did not decide expressly that no action would lie for a malicious prosecution without reasonable cause, Lord *Mansfield* and Lord *Loughborough* expressed a strong opinion to that effect; and their view has been confirmed in the later cases of *Dawkins* v. *Lord Rokeby* and *Dawkins* v. *Lord Paulet*.

It is to be observed that the Services are governed by articles and regulations of their own, and the Courts will, as a general rule, refuse to inquire into purely military or naval matters. This was definitely established in *Dawkins* v. *Lord Rokeby*, by a decision of the House of Lords. The Articles of War prescribe rules for the 'Redress of Wrongs,' and officers must be considered to be bound by those rules.

In *Barwis* v. *Keppel*[4] the Courts refused to entertain an action in the case of a sergeant who alleged that he had been maliciously reduced to the ranks by the defendant, an officer in the Guards. The act had been done in Germany during war time, and the Court held that it had no jurisdiction—the King acting there by virtue of his prerogative.

In the more recent case of *Rex* v. *The Army Council, Ex parte Ravenscroft*, [1917] 2 K. B. 504, in which Major Ravenscroft applied for a rule *nisi* for a *mandamus* to the Army Council commanding them to cause a court of inquiry to re-assemble to rehear his case, the Divisional Court refused to intervene. "In a matter affecting the discipline of the Army," said *Avory*, J., "this Court cannot interfere by *mandamus* prohibition or *certiorari* at the suit of an officer or soldier with the proceedings of a military court of inquiry or with any action that may be taken by the Army Council."

[4] 2 Wils. 314.

PROHIBITIONS.

Prohibitions del Roy (Case of Prohibitions). 5 *Ja. I.*, 1607.

12 *Rep.* 63 (vi. 280).

Case.] The King was informed (apparently by Archbishop Bancroft), upon complaint made to him by the archbishop concerning prohibitions, that he had a right to take what causes he pleased from the determination of the judges and to determine them himself.

To which *Coke*, C. J., answered, in the presence and with the consent of all the judges of England:

That the King in his own person cannot adjudge any case, either criminal or betwixt party and party, and judgments are always given by the Court:

The King may sit in the King's Bench, but the judgments are always given *per curiam;* no king after the Conquest assumed to himself to give any judgment:

The King cannot arrest any man, for the party cannot have remedy against the King.

Note.—Coke's statement that no king after the Conquest gave judgment is certainly not correct, and we must remember that the 12th Part of his Reports was not published by himself. Speaking of the Curia Regis, the well-known *Dialogus de Scaccario*[1] says, '*in qua ipse (Rex) in propria persona jura decernit*'; see also Pollock and Maitland, Hist. Eng. Law, vol. i., pp. 134 *et seq.* What James wanted was to assert a right on the part of the Crown to decide questions in which two Courts were brought into collision, and thus to decide that the King's Bench could not prohibit the Ecclesiastical Courts.[2]

[1] I. iv.; Stubbs, Select Charters, 176.
[2] See Gardiner, 2 H. E. 35, 122.

IMMUNITY OF JURORS.

Floyd *v.* **Barker.** *5 Ja. I.*, 1607.

12 *Rep.* 23 (vi. 223).

Case.] A grand jury of Anglesey had indicted William Price for murder, and he had been convicted and executed. One Floyd then proceeded by 'bill' in the Star Chamber against Barker, the judge of assize on the trial, and the grand and petty jurors.

The case was heard before *Popham*, C. J., *Coke*, C. J., the Chief Baron, the Lord Chancellor, and all the Court of Star Chamber, and it was—

Resolved:—That when a grand inquest (*i.e.* grand jury) indicts one of murder or felony, conspiracy doth not lie against the indictors, even where the party is acquitted; and that *à fortiori* it does not lie where he has been convicted.

What a judge doth as judge of record ought not to be drawn into question in this Court or before any other judge.

Note.—The reason of this is said *in loco* to be that the King himself is *de jure* to deliver justice to all his subjects, and because he cannot himself do it to all persons, he delegates his power to his judges. Any cause of complaint, therefore, ought to be laid before the King himself (at p. 25). Compare the *Earl of Macclesfield* v. *Starkey*, 1684;[1] an action of *scandalum magnatum* against one of a grand jury for a conspiracy to make a malicious and libellous presentment.

In *The King* v. *Skinner*, 1772,[2] a justice of the peace was indicted for scandalous words to a grand jury, which was supported on the ground that the grand jury had no remedy by action, but Lord *Mansfield*, C. J., quashed the indictment, observing that though the words were extremely improper, neither party, witness, counsel, judge,

[1] 10 St. Tr. 1330.

[2] Lofft, 55.

or jury can be put to answer civilly or criminally for words spoken in office, although if such words amounted to a contempt of court they might be punished as such.

Bushell's Case. 22 *Car. II.*, 1670.

Vaughan, 135; 6 *St. Tr.* 999; *Broom, Const. L.* 115-139.

Case.] A jury had acquitted William Penn and William Mead at the Old Bailey Sessions, on a charge of preaching in a London street, and had been fined by the Recorder forty marks each for contempt in doing so, and in default committed. A *habeas corpus* was moved, and the return was that the prisoners had been committed for finding a verdict 'contra plenam et manifestam evidentiam, et contra directionem curiæ in materia legis.'

Judgment.—Per *Vaughan*, C. J.:—The return is insufficient, for it gives the Court no opportunity of forming their own judgment as to the sufficiency of the evidence. Nor is the Court bound to accept the opinion of the Sessions Court, for judges' decisions are constantly reversed. Then (1) the jury may have evidence before them that the judge has not, as they are entitled to make use of their own personal knowledge by which they may be assured that what is deposed in Court is absolutely false, but to this the judge is a stranger; (2) in any case they do not find the law, and therefore cannot return a verdict 'contra directionem curiæ in materia legis.' Without a previous finding as to the facts the judge cannot direct, in matter of law, and he only knows the facts from the determination of the jury. In such a case as this a writ of attaint would either lie against the jury for a false verdict or it would not. If it did that was clearly the proper and only way for punishing them, as a fine would not bar the attaint and they could not be punished twice for the same offence. If, on the other hand, an attaint did not lie (and he was of opinion it did not), it was clearly because a jury could not be punished

in a criminal case for not finding according to the evidence and the judge's direction.

Held:—That finding against the evidence, or direction of the Court, is no sufficient cause to fine a jury.

Note.—A writ of attaint was a process by which the verdict of a jury in a civil cause might be reversed by a subsequent trial before twenty-four jurors. If the first verdict were set aside the jury who found it were punished by imprisonment and the forfeiture of all their property, or at a later date by a pecuniary fine. This proceeding had its origin in times when jurymen were considered as giving their verdict from their own pre-existing knowledge of the matter in dispute, rather than from the evidence of others given in their presence. If, therefore, they returned a perverse verdict, contrary to what was notorious in their neighbourhood, they were looked upon as having committed wilful perjury and as deserving severe punishment. The writ of attaint, having long become obsolete, was abolished by 6 Geo. 4. c. 50, s. 60.

It has been stated that the writ of attaint applied only to civil actions, and this seems the better opinion, although Hale (2 Hale, P. C. 310) speaks of the matter as being in some doubt, and 6 Geo. 4. c. 50, s. 60, appears to countenance the view that the King might have an attaint. But in criminal cases a practice undoubtedly arose in the sixteenth century of fining jurors who found verdicts of acquittal against manifest evidence and the directions of the judge. It was often protested that the practice was illegal, but it must be admitted that in *Bushell's Case* the Recorder had only followed the course frequently taken by judges of the superior Courts, more especially it would appear by *Kelyng*, C. J., who only five years previously had fined a jury at the Old Bailey 100 marks each for what he considered a perverse verdict of acquittal (see *Kelyng's Crown Cases*, ed. 1873, pp. 69 *et seq.*).

In 1667 the House of Commons took the Chief Justice's conduct in fining juries into consideration, and resolved 'that the precedents and practice of fining or imprisoning jurors for verdicts is illegal,' *Bushell's Case* followed in 1670, and the practice of punishing jurors for their verdicts was finally stopped.

RIGHT TO A JURY.

Ford *v.* **Blurton. Ford** *v.* **Sauber.**

38 *T. L. R.* 801.

Case.] These were appeals by the defendants from orders made by *Swift*, J., reversing the decision of a Master, who had ordered that the actions should be tried with a judge and jury. These actions were brought under sec. 2 of the Gaming Act, 1835, to recover the proceeds of cheques paid in respect of betting transactions. Upon the expiration of the Juries Act, 1918, the provisions of the Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, came into operation. The effect of those provisions is that, if the action is not one of those enumerated in Order 36, r. 6, viz., slander, libel, false imprisonment, malicious prosecution, seduction, breach of promise, an order for trial without a jury may be made if the Court or a judge is satisfied on an application made by either party that the action or matter cannot as conveniently be tried with a jury as without a jury.

Judgment.—'If,' said *Bankes*, L. J., 'matters are to remain in their present position, it is clear that any *right* to a jury in an action in the King's Bench Division, except in the enumerated cases, is abolished.' He trusted the question of whether the right to a trial by jury was not sufficiently important to be restored and maintained would be considered, subject to exceptions to be precisely indicated. To leave such a matter to the uncontrolled discretion of a judge was not the best way of determining it. Uniformity of practice was not likely to result under such conditions. 'Trial by jury,' said *Atkin*, L.J., 'is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the

oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases.' He was not prepared to speculate what the precise limitations in the minds of the Legislature were, and though he had serious misgivings whether the Court was correctly interpreting the real intention of Parliament, he was unable to put any other meaning upon the words than that adopted by the other members of the Court. The appeals were dismissed with costs.

Note.—The provisions giving this arbitrary power to a judge to refuse a jury would appear to be in line with the other numerous acts of both Parliament and the Executive in overriding without any mandate from the electorate the fundamental rights of the subject. Under the American Constitution this would be impossible, and if the old principle of the English common law that even an Act of Parliament cannot deprive the subject of his fundamental rights under the Constitution were restored, it would be impossible in the United Kingdom. This principle the New England colonists carried with them across the Atlantic, and it is embodied in the Constitution of the United States. In the above case *Atkin*, L. J., doubted whether the rule issued under the statute was valid.

IMMUNITY OF JUDGES.

Hamond *v.* **Howell.** 29 *Car. II.*, 1678.

2 *Mod.* 218 (*cp.* 1 *Mod.* 119, 184).

Case.] The plaintiff had been one of the jury on the trial of Penn and Mead,[1] and had been committed. He now brought an action of false imprisonment against the Recorder of London, the Mayor, and the whole Court at the Old Bailey.

The case was argued before *Vaughan*, C. J., and the Court of Common Pleas. But the whole Court were of opinion that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment; the Court had jurisdiction of the cause . . . they thought it to be a misdemeanour in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error in their judgments, for which no action will lie.

Held:—That an action will not lie against a judge for what he doth judicially though erroneously.

Anderson v. Gorrie and Others. 1894.

[1895] 1 *Q. B.* 668; 71 *L. T.* 382.

Case.] This action was brought against three judges of the Supreme Court of Trinidad and Tobago for damages for acts done by them in the course of certain judicial proceedings, the plaintiff alleging that these acts were done maliciously, without jurisdiction, and with knowledge of the absence of jurisdiction. The principal act complained of was that the plaintiff, having been summoned before the defendant Cook

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1 Cp. *Bushell's Case*, p. 143, *ante*.

to be examined as to his means of satisfying certain judgments, and the summons having been adjourned, that defendant, under certain rules of Court made in pursuance of a colonial statute, ordered him to find bail in 500*l.* and in default of so doing the plaintiff was committed to prison.

The action was tried before Lord *Coleridge*, C. J. Before the trial one of the defendants had died. At the trial the jury found in favour of the second defendant, but as regards the defendant Cook they found that he 'had overstrained his judicial powers and had acted in the administration of justice oppressively and maliciously to the prejudice of the plaintiff and to the perversion of justice,' and they assessed the damages at 500*l.* Lord *Coleridge*, C. J., directed judgment to be entered for the defendant Cook as, notwithstanding the verdict, he was of opinion that he was not liable. The plaintiff appealed.

The Court of Appeal (Lord *Esher*, M.R., and *Kay* and *A. L. Smith*, L.JJ.) affirmed the judgment of the Lord Chief Justice. The judicial proceedings and the order complained of were clearly matters within the jurisdiction of the Court of which defendant was a judge. Taking the findings of the jury to be true to the fullest extent the action will not lie against the defendant. For an act done by a judge in his capacity of judge, and in the course of his office, he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen. If a judge goes beyond his jurisdiction a different set of considerations arise.[1]

Held:—That no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.

Note.—In *Thomas Churton*,[2] in 1862, *Cockburn*, C.J., had stated that he was reluctant to decide, and would not do so until the question

[1] Questions of this kind are dealt with in the two following cases.
[2] 2 B. & S. 475; 31 L. J. Q. B. 139; 6 L. T. 320.

came before him, that if a judge abused his office by using slanderous words maliciously and without reasonable and probable cause he was not liable to an action. *Anderson* v. *Gorrie*, which, however, only followed several earlier cases, notably *Fray* v. *Blackburn*,[3] must now be taken as finally settling the law on this subject. It is unfortunate, however, that it did not receive examination by the House of Lords.

Houlden *v.* **Smith.** 13 *Vict.*, 1850.

14 *Q. B.* 841; 19 *L. J. Q. B.* 170; 14 *Jur.* 598.

Case.] This was an action of trespass for false imprisonment. The defendant, as County Court judge, had ordered the plaintiff to be committed for contempt in not appearing before him upon a judgment summons. The plaintiff did not reside in the County Court district of which the defendant was judge, but in a neighbouring district, and this was known to the defendant, who supposed, nevertheless, that he had authority. The statute under which the proceeding purported to be taken (9 and 10 Vict. c. 95, s. 98) only authorized the issue of such summonses by the County Court within the limits of which the party should then dwell or carry on business.

Held:—That the commitment being without jurisdiction, and made under a mistake in the law and not of the facts, the judge was liable in trespass.

Note.—It may perhaps be contended that County Court judges are, at any rate in most cases, now protected by 51 & 52 Vict. c. 43, s. 55 (the County Courts Act, 1888), which provides that, in any action against any person for anything done in pursuance of that Act, the warrant under the seal of the Court shall be deemed sufficient proof of the authority of the Court previous to the issuing of the warrant. See *Aspey* v. *Jones*, 54 L. J. Q. B. 98; 33 W. R. 217. In *Scott* v. *Stansfield*, (1868) L. R. 3 Exch. 220; 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911, the defendant was also a County Court judge. The defendant in his capacity as judge, and while sitting in his Court, had said of the plaintiff, an accountant, that he was 'a harpy preying on

[3] 3 B. & S. 576.

the vitals of the poor.' The plaintiff brought an action of slander, but upon demurrer it was—

Held:—That no such action would lie, even where the words used by the judge were alleged to have been spoken maliciously and without probable cause corruptly, and to have been irrelevant to the matter before him.

This decision was contrary to the earlier cases. In *Kendillon* v. *Maltby*, Car. & Mar. 409, Lord *Denman* said: 'I have no doubt in my mind that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end.'

Calder *v.* **Halket.** 2 *Vict.*, 1839.

3 *Moo. P. C. C.* 28.

Case.] This was a case before the Privy Council, on appeal from the Supreme Court of Judicature, at Fort William, in Bengal. The plaintiff had been apprehended, by order of the defendant—who was a magistrate having jurisdiction over Asiatics only, and the plaintiff was a European—for supposed participation in a riot. He brought an action for assault and false imprisonment, and upon judgment being entered for the defendant by the Supreme Court, the plaintiff appealed. By statute (21 Geo. 3. c. 70, s. 24), the provincial magistrates in India have the same immunity from actions extended to them in respect of their judicial functions as judges have in this country.

It was argued for the appellant that as the act in question was in excess of his jurisdiction, which extended only to natives, an action would lie.

Judgment.—The plaintiff was bound to show that the judge knew, or ought to have known, the defect of jurisdiction, but of this there was no evidence, as it was not shown that the defendant was at any time informed, or knew before, that the plaintiff was a European, or had such information as

to make it incumbent upon him to ascertain that fact, and the appeal must on this ground be dismissed.

Held:—That a judge is not liable in trespass for a judicial act, without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction; and that it lies on the plaintiff to prove such knowledge or means of knowledge

Note.—See the observations upon this case in *Pease* v. *Chaytor*, 3 B. & S. 620; 32 L. J. M. C. 121; 8 L. T. 613; 11 W. R. 563.

NOTE VIII.—ON THE IMMUNITY OF JUDGES.

The law as to the civil and criminal irresponsibility of judges is well settled. No judge is liable to an action before any ordinary tribunal for any judicial act or omission—with one exception, the refusal of a writ of *habeas corpus* in vacation, expressly provided for in the Habeas Corpus Act.[1] A series of decisions from the time of Coke (in *Floyd* v. *Barker*) to *Anderson* v. *Gorrie and Others*, establish that no action will lie against a judge for acts done or words spoken in his judicial capacity in a Court of justice. And judicial acts are not only those done in open Court, but all those emanating from the legal duties of a judge, as, for example, acts done in chambers.[2]

This doctrine has been applied not only to the superior Courts, but to the court of a coroner, and to a court-martial, which are not courts of record. And it does not matter although malice and corruption be alleged, or want of reasonable and probable cause. Not even if the judge exceeds his jurisdiction will he be liable to an action, unless the plaintiff can prove that he knew, or ought to have known, the defect of jurisdiction.

This rule has been established to secure the independence of the judges and to maintain their authority. For this purpose they must be free from the liability to harassing and vexatious actions at the suit of discontented parties.

The decisions cover the cases not only of the judges of the superior Courts, but also of the Court of the Vice-Chancellor of a University, an ecclesiastical judge, a coroner, and a County Court judge; nay, the principle has even been extended by analogy to the case of an arbitrator or referee,[3] with, however, the limitation that he must have acted honestly.[4]

Magistrates or justices of the peace are not protected to the same extent. Their case is specially provided for by 11 & 12 Vict. cc. 42-44

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[1] 31 Car. II. c. 2, s. 10.

[2] *Taafe* v. *Downes*, 3 Moo. P. C. C. at p. 60.

[3] *Pappa* v. *Rose*, L. R. 7 C. P. 525 (Ex. Ch.); 41 L. J. C. P. 187; 20 W. R. 784; 27 L. T. 348.

[4] *Stevenson* v. *Watson*, 4 C. P. D. at p. 158; 48 L. J. C. P. 318; 40 L. T. 485; 27 W. R. 682; *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624; 70 L. J. K. B. 482; 84 L. T. 444; 49 W. R. 401.

(Jervis's Acts), and, speaking generally, an action will lie against them in either of two events:

1. For an act done without jurisdiction.

2. For an act done within their jurisdiction, but maliciously and without reasonable and probable cause.

Justices are, however, protected by many exemptions too numerous to mention here.[5]

What remedies, then, are provided in case of error or misconduct on the part of judges?

For errors in law a remedy exists in an elaborate system of appeals. For actual misconduct on the part of judges of the superior Courts, the constitutional remedies are by impeachment, or by removal on the address of both Houses of Parliament Since the Revolution there has been only one instance of such an impeachment—the case of Lord Chancellor *Macclesfield* in 1725; though there have been several cases in which Parliamentary proceedings have been taken, in one of which a judge was removed from office.[6]

The judges of inferior Courts, however, are subject to the control of the King's Bench, and are removable for misbehaviour either by common law or by special statutes. The Lord Chancellor may remove a coroner [7] or a County Court judge [8] for inability or misconduct.

A justice of the peace is subject to a criminal information for misbehaviour; he may also be discharged from the commission at the pleasure of the Crown.

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[5] On this subject see 'Broom on Constitutional Law,' p. 787, and 'Stone's Justices' Manual' (39th ed.), p. 914.

[6] Until the Act of Settlement (12 & 13 Will. 3, c. 2, s. 3) the judges were removable at the pleasure of the Crown. By that Act it was enacted that the commissions of judges should be made *quamdiu se bene gesserint*, but that upon the address of both Houses of Parliament it should be lawful to remove them. The first case in which such an address was proposed was that of Mr. Justice *Fox* (an Irish Judge) in 1805. In 1828 Sir *Jonah Barrington* was, on an address, removed from the office of Admiralty judge in Ireland. Abortive and unfounded proceedings were taken in the House of Commons in the cases of Lord *Abinger* (1843) and Sir *Fitzroy Kelly* (1867). The control exercised by Parliament over the judicial system will be found fully treated in 2 Todd, Parl. Gov. (ed. 1869), 724-766 (c. vi.).

[7] 50 & 51 Vict. c. 71, s. 8; he may also be removed by any Court before which he has been convicted of extortion, or corruption, or wilful neglect of, or misbehaviour in, the discharge of his duty.

[8] 51 & 52 Vict. c. 43, s. 15.

MMUNITY OF PARTIES, WITNESSES AND ADVOCATES.

Astley *v.* **Younge.** 32 *Geo. III.*, 1759.

2 *Burr.* 807.

This was an action of slander and libel. The defen-
as a justice of the peace, and had refused to grant a
to one Day for a public inn. An application was then
the Court of King's Bench concerning the refusal, and
application the plaintiff made an affidavit in reference

The defendant answered this affidavit by another,
ch he alleged the plaintiff's affidavit to have been
sworn.'

plaintiff thereupon brought his action, and the
nt demurred. The demurrer was argued before Lord
ld, C. J., and the Court, who 'unanimously and
'—

l:—That no action would lie against the defendant
ds 'only spoken in his own defence, and by way of
ıtion in law, and in a legal and judicial way.'

—*Revis* v. *Smith* (18 C. B. 126; 29 L. J. C. P. 195) was a
ıction brought against a person who had been a defendant in
ery suit, and had in the course of the proceedings made an
accusing the plaintiff in *Revis* v. *Smith* of fraud. It was held
action would not lie. See also *Henderson* v. *Broomhead*
N. 569; 28 L. J. Ex. 360). Upon somewhat similar grounds
ıeld that a letter of complaint with an affidavit of alleged
ıttached, which was forwarded to the Incorporated Law Society
stigation by them, was so essentially a step in a judicial pro-
hat no action could be founded upon any statement in either
r or the affidavit—*Lilley* v. *Roney* (61 L. J. Q. B. 727). The
ing was applied in the case of a written statement made by a
man to a justice of the peace to whom an application had been

made for a reception order under the Lunacy Act, 1890, as the justice was acting judicially in the matter (*Hodson* v. *Pare*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13). If, however, an affidavit containing scandalous matter, such as allegations of dishonesty, outrageous conduct, &c., not relevant to the issue, is filed in the High Court, the Court may order the affidavit to be taken off the file and the costs of the application paid by the person at fault. R. S. C., Ord. 38, r. 11. The same applies to a scandalous pleading, if the scandalous matter is irrelevant to the issue. And if an affidavit is made extra-judicially, *i.e.* not in any pending action or legal proceeding, it is in no way privileged (*Maloney* v. *Bartley*, 3 Camp. 210).

Seaman *v.* **Netherclift.** 40 *Vict.*, 1876.

2 *C. P. D.* 53 (*cp.* 1 *C. P. D.* 540).

46 *L. J. C. P.* 128; 35 *L. T.* 784; 25 *W. R.* 159.

Case.] This was an action of slander. The defendant, an expert in handwriting, had given evidence in a suit to establish a will in which he pronounced the signature to the will, of which the plaintiff was an attesting witness, to be a forgery. The genuineness of the signature was established, and the judge made some disparaging observations on the defendant's evidence. Afterwards, in another proceeding on a charge of forgery, he was asked, in cross-examination, as to the observations of the judge above mentioned. He answered the question, and having done so, he voluntarily added that he believed 'that will to be a rank forgery.' The plaintiff then brought the present action.

It was tried before *Coleridge*, C. J., and a verdict found for the plaintiff. On motion to enter judgment for the defendant, *Coleridge*, C. J., and *Brett*, J., decided in favour of the defendant.

The case went to the Court of Appeal (*Cockburn*, C. J., *Bramwell* and *Amphlett*, L.JJ.), which

Held:—That words spoken by a witness in the course of and having reference to a judicial inquiry are absolutely

REPORTS OF PARLIAMENTARY PROCEEDINGS.

Wason *v.* **Walter.** 32 *Vict.*, 1868.

L. R. 4 *Q. B.* 73; 38 *L. J. Q. B.* 34; 17 *W. R.* 169; 19 *L. T.* 409.

Case.] This was an action of libel against one of the proprietors of *The Times* newspaper, for a report of a debate in the House of Lords, in which statements had been made reflecting on the plaintiff.

There was another count in respect of a leading article on the debate.

The action was tried before *Cockburn*, C. J., who directed the jury, that if the matter charged as a libel in the first count was a faithful and correct report of the debate, the occasion was privileged, and that as to the second count a public writer is entitled to make fair and reasonable comments on matters of public interest.

The jury found for the defendant. A rule having been obtained for a new trial on the ground of misdirection, it was argued, and the judgment of the Court was delivered by *Cockburn*, C. J.

Judgment.—The Court discharged the rule for a new trial. In the course of his judgment the Chief Justice observed that the principles on which the publication of reports of the proceedings of Courts of Justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. It is of paramount public and national importance that parliamentary proceedings shall be communicated

public, who have the deepest interest in knowing what passes in Parliament. But a garbled or partial report, or a report of detached parts of proceedings published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection. As to the count founded on the leading article, the direction to the jury was perfectly correct. Such comments are privileged if made upon a matter of public interest, with an honest belief in their justice and with such a reasonable degree of judgment and moderation as in the opinion of the jury to amount to a fair and legitimate criticism on the conduct and motives of the person censured.

Held:—That a faithful report in a public newspaper of a debate in Parliament is not actionable at the suit of a person whose character may have been called in question in the debate; nor is a fair and honest comment upon a speech made in the course of such a debate.

REPORTS OF JUDICIAL PROCEEDINGS, &c.

Usill *v.* **Hales.** 41 *Vict.*, 1878.

3 *C. P. D.* 319; 47 *L. J. C. P.* 323; 26 *W. R.* 371; 38 *L. T.* 65.

Case. | This was an action against the publisher for an alleged libel published in the *Daily News*, consisting of a report of an application made by three persons to a police magistrate for a summons against the plaintiff. The application was *ex parte;* the magistrate held that it only had relation to a matter of contract, and that he had no jurisdiction in the matter, and he referred the applicant to the County Court.

The action was tried before *Cockburn*, C. J., who directed the jury that the publication, if a fair and impartial report, was privileged. The jury found for the defendant.

The case was argued on an application for a new trial, and it was by *Coleridge*, C.J., and *Lopes*, J.,

Held:—That a fair and impartial report of a proceeding in a police court, even though it was an *ex parte* and preliminary proceeding, is privileged.

Note.—Compare the case of *Lewis* v. *Levy*, 1858; (E. B. & E. 537) nearly to the same effect. In both these cases the Court followed and approved a much earlier authority, *Curry* v. *Walter* (1 Bos. & Puller, 525), in which it was held that an action was not maintainable against a newspaper proprietor for publishing a true account of an application to the King's Bench for an information against two justices for refusing to license an inn.

So far as newspaper proprietors are concerned they are now protected by statute as well as by the common law. The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64, s. 3), enacts that 'a fair and accurate report *in any newspaper* of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that

nothing in this section shall authorize the publication of any blasphemous or indecent matter.' By sec. 8 no *criminal* prosecution shall be commenced against any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers.

It will be seen that the above provisions only apply to reports appearing in newspapers. In *Kimber* v. *The Press Association* ([1893] 1 Q. B. 65; 62 L. J. Q. B. 152; 41 W. R. 17; 67 L. T. 515) an attempt was made to make the defendants, who were not newspaper proprietors, responsible for a report supplied by them of an *ex parte* application to justices for a summons against the plaintiff for perjury; but the Court of Appeal followed *Usill* v. *Hales* and *Curry* v. *Walter*, and held that the action was not maintainable, as although the justices had power to hear such an application in private, they had not done so.

The privilege extends to fair and accurate reports of the proceedings of *all* Courts while sitting in public; 'for this purpose no distinction can be made between a Court of *pie-poudre* and the House of Lords sitting as a Court of justice,' per Lord *Campbell*, C. J., in *Lewis* v. *Levy*, E. B. & E., at p. 554; and see *Hodson* v. *Pare* [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

It would appear somewhat doubtful whether the Law of Libel Amendment Act, 1888, sec. 3, gives an absolute privilege in the case of newspaper reports, or whether, as in all cases of qualified privilege, the privilege can be rebutted by proof of express malice; see, as to this, Odgers on 'The Law of Libel and Slander' (5th Ed., p. 308). Before the Act it was held that even a true report of proceedings in a Court of justice was not privileged absolutely, and that if it were sent to a newspaper for publication from a malicious motive, an action would lie against the person so sending it: *Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

The right to comment stands upon a different footing to the right to report. Many statements in reports of legal proceedings are defamatory and libellous in the highest degree, but they are protected by the law, if they are fair and accurate, on the ground that the occasion is privileged. But fair comment and criticism on matters of public interest, although they may be in severe terms, are really not libellous at all. The distinction was pointed out by Lord *Esher*, M. R., in *Merivale* v. *Carson*, 20 Q. B. D. at p. 280. Such comment only becomes libellous when it ceases to be what the law calls 'fair,' and whether it is fair criticism or not is a question for the jury. A man is entitled to entertain and express any opinion he pleases upon matters of public interest, however wrong, exaggerated, or violent it may be,

and it must be left to the jury to say whether the mode of expression exceeds the limit of fair criticism (per *Bowen*, L. J., in *Merivale* v. *Carson*, *sup.*). Criticism of the conduct of a judge in a judicial proceeding is permissible, but it must not be such as to be calculated to obstruct or interfere with the due course of justice (*Skipworth's Case*, L. R. 9 Q. B. 230), or to amount to personal scurrilous abuse of the judge as a judge (*R.* v. *Gray*, [1900] 3 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474), or the offender may be dealt with for contempt of Court.

Davison *v.* **Duncan.** 20 *Vict.*, 1857.

7 E. & B. 229; *26 L. J. Q. B.* 104; *5 W. R.* 253.

Case.] This was an action for a libel contained in the report of the proceedings at a meeting of Improvement Commissioners to which the public were admitted. The defendant demurred, alleging that the report was a true account, published without malice.

The demurrer was heard before *Campbell*, C.J., *Coleridge*, *Wightman*, and *Crompton*, JJ., and allowed.

Held:—That it has never yet been held that privilege extends to a report of what takes place at all public meetings.

Note.—The above case is retained as showing what was the law as to reports of public meetings before the statutory provisions set forth below, which have to a very great extent altered the law on the subject. But it must be remembered that *Davison* v. *Duncan*, followed and affirmed as it was by the Court of Appeal in the later case, *Purcell* v. *Sowler*, 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416, still applies to all reports except those published by newspapers. and also to newspaper reports of meetings other than those specified in the Act of 1888, and to cases where the defendant had not inserted a reasonable contradiction as provided by the Act.

The Act referred to is the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), by sec. 4 of which a fair and accurate report published in any newspaper of the proceedings of a public meeting, *or* (except where neither the public nor a newspaper reporter is admitted) of any meeting of a local authority (the various authorities are specified in the section), or any committee thereof, or of Royal Commissioners,

or select committees of either House of Parliament, or of justices at Quarter Sessions, and the publication at the request of any Government department, or police authority, of any notice or report issued for the information of the public, shall be privileged, *unless* published or made maliciously; provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter; and provided also that the protection afforded by the section shall not be available as a defence if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same; provided further that nothing in the section shall be deemed to limit or abridge any privilege by law existing, or to protcet the publication of any matter not of public concern and the publication of which is not for the public benefit. For the purposes of this section the expression 'public meeting' means any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

In *Chaloner* v. *Lansdown & Sons*, 10 T. L. R. 290 (1894), the report was published in the *Wiltshire Times* of a sermon preached in a Congregational chapel in which the plaintiff was attacked. It was held that the chapel service was not a public meeting within sec. 4 of the Act of 1888. The jury found the report to be fair and accurate, but published maliciously. *Ponsford* v. *Financial Times, Lim.*, 16 T. L. R. 248 (1900), was an action for libellous statements contained in a report in the *Financial Times* of a meeting of shareholders. In the chairman's speech unfounded charges of fraud were made against the secretary. These charges were held not to be of public interest, and consequently the report was not privileged. The question whether the matters complained of are of 'public concern,' and the publication thereof is for the public benefit, is for the Court; *Adams* v. *Ward* [1917] 2 A. C. 332.

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